United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

APPENDIX

In The United States Court Of Appeals
For The District Of Columbia Circuit

469

Case No. 21,942

EDWIN R. FISCHER,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

THE TIDEWATER BROADCASTING COMPANY, INC.,

Intervenor.

Appeal From Memorandum Opinion And Order And
From Decision Of Federal Communications Commission

October 2, 1968

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,942 September Term, 1967

Edwin R. Fischer,

Appellant

v.

Federal Communications Commission,

Appellee.

The Tidewater Broadcasting Company, Incorporated,

Intervenor.

Before: Robinson, Circuit Judge, in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWIN R. FISCHER, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee, THE TIDEWATER BROADCASTING COMPANY, INC., Intervenor.	)	Case No. 21,942

STIPULATION OF PARTIES WITH REGARD TO THE RECORD

In accordance with Rule 17(b) of the Federal Rules of Appellate Procedure, prescribed and adopted December 4, 1967, all the parties in the above case stipulate that neither the record nor a certified list will be filed with the Court. Because most of the rather lengthy record in this case is irrelevant to this appeal, it is believed that this stipulation will better serve the orderly disposition of the case. The date of the filing of this stipulation shall be deemed the date on which the record is filed.

In addition, the parties will file the appendix as provided in Rule 30(a) and (b). Thus, citations to pertinent parts of the record will be to the appendix which will be filed with appellant's brief.

Respectfully submitted,

Robert M Booth, Jr.
Counsel for Tidewater
Broadcasting Co., Inc.

John H. Conlin
Associate General Counsel
Federal Communications Commission

William P. Bernton
Counsel for Edwin R. Fischer

July 1, 1968

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

B
FCC 64-355
49197
(CORRECTED)

In re Applications of	)	
	)	
THE TIDEWATER BROADCASTING COMPANY, INC.	)	DOCKET NO. 13243
Smithfield, Virginia	)	File No. BP-12814
	)	
EDWIN R. FISCHER	)	DOCKET NO. 13248
Newport News, Virginia	)	File No. BP-13114
	)	
For Construction Permits	)	

ORDER

By the Commission: Commissioners Hyde and Lee absent; Commissioner Cox not participating.

At a session of the Federal Communications Commission held at its offices in Washington, D. C. on the 22nd day of April, 1964;

The Commission having under consideration a petition to reopen the record and enlarge the issues filed March 16, 1964 by The Tidewater Broadcasting Company, Incorporated, comments thereon of the Chief, Broadcast Bureau, filed March 31, 1964, and other matters of record herein;

IT APPEARING, That because of a common ownership interest in The Tidewater Broadcasting Company, Incorporated and The Accomack-Northampton Broadcasting Company, Incorporated, licensee of Station WESR, Tasley, Virginia, a question arises whether grant of the proposal of the former would contravene the provisions of Section 73.35(a) of the Commission's Rules;

IT APPEARING, That it is appropriate to grant the relief requested, but that any evidentiary hearing on the added issue should be held in abeyance so long as the stay (imposed by order released August 3, 1961, FCC 61-935) of the effective date of the Initial Decision in the above-captioned proceeding remains in effect;

IT IS ORDERED, That the petition to reopen the record and enlarge the issues filed March 16, 1964, by The Tidewater Broadcasting Company, Incorporated IS GRANTED:

IT IS FURTHER ORDERED, That the record in the above-captioned proceeding IS REOPENED for the purpose of enlarging the issues to include the following issue:

> "To determine whether a grant of the proposal of the Tidewater Broadcasting Company, Incorporated, would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations, and, if so, whether circumstances exist which would justify waiver of the rule."

IT IS FURTHER ORDERED, That the stay is to remain in effect until further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: April 30, 1964

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 65D-16

66660

In re Applications of	)	
	)	
THE TIDEWATER BROADCASTING COMPANY, INC.	)	DOCKET NO. 13243
Smithfield, Virginia	)	File No. BP-12814
	)	
EDWIN R. FISCHER	)	DOCKET NO. 13248
Newport News, Virginia	)	File No. BP-13114
	)	
For Construction Permits	)	

Appearances

Robert M. Booth, Jr. and Joseph F. Hennessey, on behalf of The Tidewater Broadcasting Company, Inc.; William P. Bernton and E. Theodore Mallyck, on behalf of Edwin R. Fischer; and James F. Marten, on behalf of the Broadcast Bureau of the Commission.

SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of The Tidewater Broadcasting Company, Inc. and Edwin R. Fischer, each for a standard broadcast station to operate on 940 kc, daytime only, with a power of 10 kw, at Smithfield, Virginia, and Newport News, Virginia, respectively. These applications were designated for hearing by order of the Commission released October 28, 1959, in a consolidated proceeding which then involved 31 applications for new or modified standard broadcast stations in Virginia, North Carolina, Maryland, Pennsylvania, Ohio, Indiana, Illinois, Michigan, Kentucky, Tennessee and Mississippi, to operate on 940 kc or channels immediately adjacent thereto. Amendments, dismissals, and grants without hearing, pursuant to petitions for reconsideration, of a number of applications made possible the severance of various applications into separate proceedings. The two instant applications were, by order dated March 9, 1961, severed from the other applications into the above-styled proceeding, hearings held, and an Initial Decision issued on July 5, 1961 (FCC 61D-102).

2. One of the applications designated for hearing with the Tidewater and Fischer applications and later severed and made a part of another group of applications was that of CABA Broadcasting Corporation, Docket No. 13245, which application was thereafter amended and became that of Radio Americana, Inc., requesting a construction permit for a new station at Baltimore, Maryland, Docket No. 13245, File No. BP-12962. Although some mutual interference would occur between Radio Americana's

proposed operation and the mutually exclusive proposals of Tidewater and Fischer, such interference was not deemed to be of such character as to make the Baltimore application mutually exclusive with those involved in the instant proceeding. Pursuant to petition for reconsideration filed by Radio Americana, its application was severed and granted without further hearing by order of the Commission en banc, released January 9, 1961 (FCC 61-12). Subsequently, on August 3, 1961 (FCC 61-935), the Commission, on its own motion, issued an order staying further consideration of the Tidewater and Fischer applications "pending further review by the Commission". Further consideration of the Tidewater and Fischer applications was again stayed in a Memorandum Opinion and Order of the Commission involving the application of Radio Americana, Docket No. 13245 (Radio Americana, Inc., 21 RR 70-a, 70-g, paragraph 11). The stay orders did not suspend the filing of exceptions to the Initial Decision and such exceptions and replies thereto were filed on September 18, 1961 and October 24, 1961, respectively. A petition by Fischer requesting that the stay be lifted was denied by the Commission in an order released November 15, 1962 (FCC 62-1176).

3. No further action was taken in this proceeding until April 30, 1964, when the Commission issued an order (FCC 64-355-Corrected) granting a petition filed by Tidewater on March 16, 1964, which requested that the record be reopened and the following issue be added:

> "To determine whether a grant of the proposal of the Tidewater Broadcasting Company, Incorporated, would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations, and, if so, whether circumstances exist which would justify waiver of the rule."

This order further provided that, "/T/he stay is to remain in effect until further order of the Commission."

4. The necessity for the additional issue 1/ arises out of the common ownership and control of the Tidewater Broadcasting Company, applicant herein, and Accomack-Northampton Broadcasting Company, the licensee of standard broadcast Station WESR, Tasley, Virginia, and became pertinent herein in connection with the increase in power of WESR. The common

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1/ A Section 73.35 (multiple ownership) issue as to Tidewater was not included in the original order of designation and no request for such issue was made. However, subsequent to the adoption of the order of designation in the instant proceeding, Station WESR filed an application for construction permit to increase the power of Station WESR from its original operating power of 1 kw to 5 kw (File No. BP-15024).

ownership and control as it existed at the time of the original hearing in the instant proceeding are set forth in paragraphs 28 and 29-b of the Findings of Fact of the Initial Decision. Since then, Charles F. Russell has died and his subscription to 10% of Tidewater stock has been assumed equally by Vernon H. Baker and C. Brooks Russell, thereby increasing their subscriptions from 40 to 45% each. The Tidewater application was amended to reflect this change pursuant to order released June 25, 1964 (FCC 64M-594). An examination of the WESR application for increased power showed an interference problem with co-channel Station WASA, Havre de Grace, Maryland, which had also filed an application for construction permit to increase its daytime power from 1 kw to 5 kw (File No. BP-15134). The applications of WESR (Docket No. 14945) and WASA (Docket No. 14946) were designated for hearing in a consolidated proceeding on February 4, 1963. On June 4, 1963, each of the applicants petitioned for leave to amend application, and by order, released June 12, 1963, the petitions for leave to amend were granted, the applications removed from the hearing docket and returned to the processing line. The Commission, on May 6, 1964, granted the applications of WESR and WASA, 2/ for increase of power to 5 kw for the respective stations.

5. In the meantime, the Commission, on July 16, 1962, issued a notice of proposed rule making (Docket No. 14711), inviting comments upon a proposal to amend the multiple ownership rule (Section 73.35) to prohibit overlap of the 1 millivolt per meter contours of commonly owned or controlled stations.

6. When it appeared that the WESR application would not be acted upon until a decision had been reached on Tidewater's application, which might not be forthcoming for some time because of the stay and related problems in connection with the application of Radio Americana, Tidewater, on March 16, 1964, petitioned to reopen the record in this proceeding and to add a multiple ownership issue relating to the common ownership and control of WESR and Tidewater. As already indicated, such petition was granted by the Commission and the multiple ownership issue was added by an order released April 30, 1964 (FCC 64-355-Corrected). The Commission thereupon granted the 5 kw application of WESR. 3/

7. Subsequent to the prehearing conference in this proceeding held after remand in connection with the added issue, on May 13, 1964, the Commission, on June 9, 1964, released a report and order in the rule making proceeding (Docket No. 14711) amending Section 73.35 as proposed to prohibit overlap of the 1 mv/m contours of stations under common ownership and control (FCC 64-445; 2 RR 2d 1588). It is also noted that on

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2/ In September of 1963, Accomack-Northampton, licensee of WESR, had submitted to the Commission an engineering study showing overlap of the 2 and 0.5 mv/m contours of Tidewater's proposal and the 2 and 0.5 mv/m contours of the existing 1 kw and proposed 5 kw operation of WESR.

3/ Official notice taken of Commission action.

July 9, 1964, the Commission, in Public Notice Mimeo 53284, announced that the newly revised multiple ownership rule would not be applied in hearing cases where an Initial Decision had been issued prior to adoption of the new rule and that such cases would be decided under the old rules and policies. At the prehearing conference on September 21, 1964, the Hearing Examiner ruled that, under the special circumstances of this case, the new multiple ownership rule was to be applied in this proceeding and that evidence to support a waiver of the rule could be offered.

8. In a Memorandum Opinion and Order, released February 15, 1965, the proceeding in Docket No. 13245 was terminated and the application therein of Radio Americana, Inc. dismissed with prejudice and several new applications for new standard broadcast stations at Lebanon, Pennsylvania, and Catonsville, Maryland, respectively, all requesting authorization on 940 kc, 1 kw, were designated for consolidated hearing. Such Memorandum Opinion and Order further provided that in the event of a grant of any of the applications, the construction permit shall contain the condition that,

> "Permittee shall accept any interference resulting from a grant of either of the applications of Edwin R. Fischer, File No. BP-13114 or The Tidewater Broadcasting Co., Inc., File No. BP-12814."

9. By order dated March 3, 1965 (FCC 65-161), the Commission, pursuant to petition of Fischer filed February 10, 1965, vacated the stay in this proceeding, reciting the fact that the application of Radio Americana had been dismissed and that any interference resulting from a grant of either of the applications in the instant proceeding must be accepted by any of the applicants in Lebanon, Pennsylvania, or Catonsville, Maryland, which might receive a grant.

10. Further prehearing conferences were held on May 13, 1964, and September 10 and 21, 1964, and evidentiary hearings were held on November 19 and 30, 1964, and the record closed on the last named date. By mesne orders, the dates for the filing of supplemental proposed findings of fact and conclusions of law and replies thereto were extended to February 5, 1965, and February 23, 1965, respectively. Supplemental proposed findings of fact and conclusions of law were filed on February 5, 1965, by both Tidewater Broadcasting and by the Broadcast Bureau; on February 10, 1965, Edwin R. Fischer filed comments on the proposed findings and conclusions; and on February 23, 1965, Tidewater Broadcasting filed its reply to the supplemental proposed findings of fact and conclusions of law. 4/

4/ These pleadings are in compliance with the agreement of the parties made on the record on November 30, 1964, and approved by the Hearing Examiner.

SUPPLEMENTAL FINDINGS OF FACT

11. The Tidewater applicant and the licensee of Station WESR are under common control. Tidewater seeks a construction permit for new daytime only Class II station for non-directional operation on 940 kc, with power of 10 kw, at Smithfield, Virginia, and Station WESR, at Tasley, Virginia, is a Class III station operating daytime only on 1330 kc, with power of 5 kw.

Engineering Considerations

The Tidewater Proposal - Smithfield, Virginia

12. The evidence concerning coverage of Tidewater's proposed station presented at the original hearing (paragraph 20 of the findings of fact of the Initial Decision) was based upon the 1950 U.S. Census. At the further hearing, Tidewater presented additional evidence based upon the 1960 U.S. Census and a minor revision of some contours. Based on an effective field (unattenuated at one mile) of 570 mv/m and conductivity values from Figure M-3 of the Rules, 5/ pertinent area and population data with respect to Tidewater's proposed operation at Smithfield are set forth in the following tabulation: 6/

5/ Conductivity of Chesapeake Bay was assumed to be 40 mm/m above and 2,000 mm/m below a line drawn west from Cambridge, Maryland. For the James, Rappahannock and York Rivers, a conductivity of 40 mm/m was assumed.

6/ The parties stipulated that there would be no significant difference in the coverage proposals of Tidewater and Fischer. The findings in the tabulation are thus equally applicable to Fischer's proposed operation at Newport News.

0.5 mv/m Contour	Population 7/	Area (sq. mi.) 8/
North Carolina	35,392 (3.48%)	1,504 (22.84%)
Maryland (East of Chesapeake Bay)	16,727 (1.65%)	476 (7.23%)
Virginia (East of Chesapeake Bay)	37,741 (3.71%)	510 (7.75%)
Virginia (South and West of Chesapeake Bay) 9/	926,378 (91.16%)	4,094 (62.18%)
Chesapeake Bay	-	2,139
Interference-free Total	1,016,238 (100.0%)	6,584 (100.0%)

13. Since, at the time the further hearing was held, the Commission had imposed a stay as to the Initial Decision in this proceeding in connection with the setting aside of its grant of the Radio Americana, Inc. application (Docket No. 13245) for a new co-channel station at Baltimore, Maryland, it was agreed that the Supplemental Initial Decision would be stayed consistent with the Commission's stay of the original Initial Decision. The Commission later accepted for filing three additional applications in the Baltimore-Catonsville, Maryland area. 10/ Subsequently, the Radio Americana application was dismissed (Memorandum Opinion and Order released February 15, 1965; FCC 65-102). 11/ In view of this action of the Commission, it is unnecessary to make findings with respect to the effect of the proposed Radio Americana operation upon the Tidewater proposal. The three remaining proposals would cause objectionable interference to Tidewater's proposal to the following extent:

7/ Based upon 1960 U.S. Census, with cities having populations of 2,500 or more located between the 0.5 and 2 mv/m contours excluded. Percentages are based upon total interference-free population.

8/ Water areas excluded. Percentages are based upon total interference-free land area.

9/ Because of first adjacent channel interference from Station WXGI, Richmond, Virginia, 5,924 persons in an area of 368 square miles would not receive primary service from the proposed operation.

10/ Several applications were also accepted for Lebanon, Pennsylvania. However, no objectionable interference would be experienced between these Lebanon applications and Tidewater.

11/ Petition for reconsideration of such action was filed March 17, 1965, by Radio Americana and is now pending before the Commission.

(a) From either the application of Catonsville Broadcasting Company (File No. BP-16105, Docket No. 15838) or that of Radio Catonsville (File No. BP-16106, Docket No. 15839) at Catonsville:

	Population	Land Area (sq. mi.)
West of Chesapeake Bay	14,847	256
East of Chesapeake Bay	30,709	686
Total Interference	45,556	942
Smithfield Interference-free	970,682	5,642

(b) From application of Commercial Radio Institute (File No. BP-16107, Docket No. 15840) at Catonsville:

	Population	Land Area (sq. mi.)
West of Chesapeake Bay	8,368	223
East of Chesapeake Bay	32,517	747
Total Interference	40,885	970
Smithfield Interference-free	975,353	5,614

Station WESR, Tasley, Virginia

14. The present 5-kw power operation of Station WESR at Tasley, Virginia, receives objectionable interference from Stations WASA, Havre de Grace, Maryland, and WUSM, Havelak, North Carolina.

15. Based on an effective field (unattenuated at one mile) of 450 mv/m, and ground conductivity values based upon measurements submitted by Stations WESR and WASA in support of their applications for power increase to 5 kw and values from Figure M-3 of the Rules where the measurements were not applicable, 12/ the pertinent area and population data with respect to WESR's operation are set forth in the following tabulation:

12/ See footnote 5, above, for conductivities of bodies of water.

0.5 mv/m Contour	Population 13/	Area (sq. mi.) 14/
North Carolina Interference-free 15/	2,871 (2.38%)	65 (3.61%)
Maryland (West of Chesapeake Bay) 16/	12,102 (10.03%)	364 (20.23%)
Maryland (East of Chesapeake Bay) 17/	15,696 (13.02%)	58 (3.22%)
Virginia (West of Chesapeake Bay)	50,251 (41.65%)	581 (32.30%)
Virginia (East of Chesapeake Bay)	39,718 (32.92%)	731 (40.63%)
Chesapeake Bay	-	2,081
Interference-free Total	120,638 (100.0%)	1,799 (40.63%)

The service in North Carolina is in a long, narrow area along the shore of the Atlantic Ocean. Except for this area of approximately 64 square miles, no areas south of the Chesapeake Bay receive service from Station WESR.

Overlap Considerations

16. Overlap of the service areas is occasioned in large measure by the substantial salt-water areas of high conductivity that intervene between Smithfield and Tasley. Finger-like projections of the respective field strength contours over water areas cause much of the overlap to fall in the Bay.

17. The approximate minimum and maximum distances from Tidewater's proposed transmitter site at Smithfield to various contours would be as follows:

13/ Based upon 1960 U.S. Census, with cities having populations of 2,500 or more located between the 0.5 and 2 mv/m contours excluded. Percentages are based upon total interference-free population.

14/ Water areas excluded. Percentages are based upon total interference-free land area.

15/ Interference from WUSM causes interference to 2,096 persons in an area of 120 square miles.

16/ Interference from WASA causes interference to 3,937 persons in an area of 58 square miles.

17/ Interference from WASA causes interference to 4,709 persons in an area of 86 square miles.

Contour	Minimum (miles)	Maximum (miles)
2.0 mv/m	22	87
1.0 mv/m	29.5	96
0.5 mv/m	41.5	105
Interference-free if any of 3 Catonsville applications granted	35	94-96
Interference-free if all applications denied	35	105

The airline distance between the transmitter sites of WESR and the proposed Smithfield station is 69 miles, of which approximately 30 miles is over the waters of Chesapeake Bay. A signal of less than 1 mv/m but more than 0.5 mv/m would be placed over Tasley by Tidewater. However, if any of the applications in the Catonsville area should be granted, Tasley would lie within the interference area. The approximate minimum and maximum distances from WESR's transmitter site at Tasley to various contours are as follows:

Contour	Minimum (miles)	Maximum (miles)
2.0 mv/m	12.5	58
1.0 mv/m	19	61
Interference-free	26	80

The wide variations in the distances to the various contours arise from the presence of Chesapeake Bay and numerous inlets and tributaries close to the transmitter sites at both Tasley and Smithfield. The conductivity varies from a low of 2 and 4 mm/m over the land to a high of 5,000 mm/m over Chesapeake Bay.

18. The extent of overlap of the 1 mv/m and interference-free contours of WESR and the proposed Smithfield station depends, in part, on the action to be taken on the pending co-channel applications in the Catonsville area.

(a) If none of the pending co-channel applications in the Catonsville area are granted, the following areas and populations would receive service from both WESR and Tidewater's proposed station at Smithfield:

1 mv/m Contours	Population	Land Area (sq. mi.)
West of Chesapeake Bay	4,885	64
East of Chesapeake Bay (Virginia)	12,514	224
East of Chesapeake Bay (Maryland)	5,547	123
Total 1 mv/m overlap	22,946	411
Interference-free Contours (0.5 mv/m)		
West of Chesapeake Bay	22,513	220
East of Chesapeake Bay (Virginia)	24,805	491
East of Chesapeake Bay (Maryland)	11,007	294
Total interference-free overlap	58,325	1,005

The overlap of the interference-free areas, expressed in percentages of the interference-free populations and areas for both WESR and the proposed Smithfield station, would be as follows:

	Smithfield		WESR	
	Population	Area	Population	Area
West Chesapeake Bay	2.22%	3.34%	18.67%	12.23%
East Chesapeake Bay	3.52%	11.92%	29.69%	43.64%
Total	5.74%	15.26%	48.36%	55.87%

(b) If either the Catonsville Broadcasting Company (BP-16105) application or the Radio Catonsville (BP-16106) application for Catonsville is granted, the areas and populations would be as follows:

1 mv/m Contours	Population	Land Area (sq. mi.)
West of Bay	4,885	59
East of Bay (Virginia)	1,574	31
East of Bay (Maryland)	4,088	51
Total 1 mv/m overlap	10,547	141
Interference-free Contours		
West of Bay	19,149	261
East of Bay (Virginia)	1,886	46
East of Bay (Maryland)	4,556	69
Total interference-free overlap	25,591	376

The overlap of the interference-free areas, expressed in percentages, would be as follows:

	Smithfield		WESR	
	Population	Area	Population	Area
West of Bay	1.97%	4.63%	15.87%	14.51%
East of Bay	0.66%	2.04%	5.34%	6.39%
Total	2.63%	6.67%	21.21%	20.90%

(c) If the application of Commercial Radio Institute for Catonsville should be granted, the areas and populations would be as follows:

1 mv/m Contours	Population	Land Area (sq. mi.)
West of Bay	4,285	90
East of Bay (Virginia)	1,344	28
East of Bay (Maryland)	4,088	38
Total 1 mv/m overlap	10,317	156
Interference-free Contours		
West of Bay	20,153	295
East of Bay (Virginia)	1,426	42
East of Bay (Maryland)	4,556	64
Total interference-free overlap	26,135	401

The overlap of the interference-free areas, expressed in percentages, would be as follows:

	Smithfield		WESR	
	Population	Area	Population	Area
West of Bay	2.07%	5.23%	16.71%	16.40%
East of Bay	0.62%	1.89%	4.96%	5.89%
Total	2.69%	7.12%	21.67%	22.29%

19. If all of the applications in the Catonsville area are denied, the areas within the interference-free contours of both WESR and the proposed Smithfield station would receive a minimum of 7 and a maximum of 17 other services. If any of such applications should be granted, the minimum and maximum of other services would be 7 and 18, respectively.

20. The 2.0 mv/m contours of Tidewater and Station WESR would also overlap. This would include areas in the Chesapeake Bay and rural land areas adjoining the southern portion of the bay. These land areas would be very small in extent and would lie immediately adjacent to the shore in Maryland and Virginia.

Character of the Areas

21. Detailed findings of fact concerning Smithfield and the adjacent areas are set forth in paragraphs 9 to 13, inclusive, of the Initial Decision and need not be repeated here other than to note that Smithfield lies to the south of Chesapeake Bay and that agriculture in the area is devoted primarily to raising peanuts, corn, soybeans and livestock, largely hogs.

22. As noted in paragraph 9 of the findings of fact of the Initial Decision, the peninsula north of the outlet to the Atlantic Ocean and between the ocean and Chesapeake Bay is known as the "Eastern Shore". An unincorporated area known as Tasley, which lies between and contiguous to the incorporated municipalities of Onancock, Accomac and Onley, is located on the narrow peninsula (10 to 12 miles wide) some 44 airline miles north of the outlet to the ocean and some 16 airline miles south of the Maryland-Virginia boundary. The center of Tasley lies about 1.5 miles west of the western boundary of Accomac, 1.7 miles east of the eastern boundary of Onancock, and 1.0 miles north of the northern boundary of Onley. The population of the incorporated municipalities, according to the 1960 U.S. Census, is as follows: Onancock, 1,759; Accomac, 414; and Onley, 415. The population of the unincorporated area of Tasley was determined to be 742 by counting the number of residential units in the area served by the Tasley Post Office and multiplying by the average number of residents per household for Accomack County as shown in the 1960 Census. A single school system serves the entire area, with high schools and grade schools located in both Onancock and Accomac. Students from throughout the area attend the schools. Two volunteer fire departments, one in Tasley and one in Onancock, cooperate in providing fire protection to the entire area including Accomac and Onley and are dispatched by the telephone operator in Onancock. A single telephone exchange, located in Onancock, serves the entire area. Police protection is provided in Onancock by a department consisting of two fulltime and two parttime men. Protection to other areas is provided by the sheriff's office which is located in Accomac, and by the Virginia State Police, which maintains an office about 3.5 miles south southwest of Tasley. The only Catholic church in the area, St. Peter's, is located immediately north of Onley. Methodist churches are located in Tasley, Onancock, Onley and Accomac; Baptist churches are located in Onancock, Onley and Accomac; and Episcopal and

Presbyterian churches are located in Onancock and Accomac. Accomac is the county seat of Accomack County and the usual county offices are located there, as well as a State Highway Office. The only municipal water and sewage systems are located in Onancock. There are two super-markets in the area, one in Onancock and one in Tasley; the only Ford dealer is in Tasley; the only Chevrolet dealer is in Onancock; the only Pontiac dealer is in Tasley; and the only Chrysler-Plymouth dealer is in Accomac.

23. The Eastern Shore peninsula has been the subject of studies by the Division of Industrial Development and Planning of the Governor's Office, Commonwealth of Virginia, and the Area Redevelopment Administration of the United States Department of Commerce. The peninsula is divided into two counties, Accomack to the north and Northampton to the south. Accomack County is about twice as large as Northampton County, both in area and population. The 1960 U.S. Census gives the populations as 30,635 for Accomack County and 16,966 for Northampton County. The entire peninsula, about 70 miles long, is mostly flat land, with some low-lying hills on the Chesapeake Bay side. A string of off-shore island beaches lie along the sea-side of the peninsula and are separated from the mainland by several miles of marshland and open bays. Of the peninsula's seven hundred square miles of land area, almost one-third is made up of commercial forests. Most of the remaining land is used for growing soy beans, Irish potatoes, string beans, tomatoes, and various other vegetable crops. Historically, one of the significant forces influencing the economic, political, and social structures of the Eastern Shore has been the relative isolation of the area. Until recently, the only connection between the peninsula and the Norfolk area to the south was by ferry across the outlet of Chesapeake Bay. In 1964, the Chesapeake Bay Bridge and Tunnel was opened for vehicular traffic with rates varying from a minimum of $4.00 for a passenger car with driver to $22.00 for large vehicles. For some years, Accomack and Northampton Counties were members of the Tidewater Virginia Development Council, as were the five counties which make up the Tidewater area, Isle of Wight, Surry, Sussex, Nansemond and Southampton. In 1962, however, Accomack and Northampton Counties withdrew from the Council because of the lack of common interests of the Eastern Shore with the area to the south. The only broadcast station on the Eastern Shore is WESR at Tasley.

CONCLUSIONS

1. This proceeding involves the mutually exclusive applications of The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer, requesting construction permits for new broadcast stations on 940 kc at Smithfield, Virginia and Newport News, Virginia, respectively. The original Initial Decision, which was released on July 11, 1961, considers and disposes of all issues except the one added in the order 1/ by the Commission in which the record was reopened, the issues enlarged and the proceeding remanded. The added issue 2/ deals with the question of overlap between the proposed Smithfield station and Station WESR at Tasley, Virginia, which are under common control, and requires a determination of whether a grant of the Tidewater proposal would be in contravention of Section 73.35(a) 3/ of the Commission's Rules; and, if so, whether circumstances exist which would justify a waiver of the Rule.

2. A resume of the history of this proceeding and the power increase of Station WESR, as well as the history of the 1 mv/m overlap Rule as now embodied in Section 73.35(a) and its chronological relationship to the Tidewater proposal, is necessary to a proper resolution of this added issue. In this connection consideration must be given to the question of whether such Rule is applicable at all under the circumstances here existing; and, if so, whether the instant facts and circumstances justify a waiver of the Rule.

3. The evidence clearly shows that the Tidewater applicant and the licensee of Station WESR are under such common control as is contemplated by Section 73.35(a) of the Rules. The evidence also shows that there would be an overlap of the 1 mv/m contours of the Tidewater proposal and Station WESR.

1/ Released April 30, 1964.

2/ See page 2, supra, for text of such issue.

3/ Section 73.35 reads, in pertinent part, as follows:

> "Multiple Ownership. No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> "(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with Section 73.183 or Section 73.186;"

4. At least two new facts now exist which did not exist at the time of the issuance of the Initial Decision, on July 5, 1961, in this proceeding: (1) the amendment of Section 73.35(a), which was adopted on May 20, 1964 (released June 9, 1964, and effective July 16, 1964); and (2) the increase in power granted to Station WESR May 6, 1964.

5. A major complication affecting the expeditious final determination of this proceeding was the stay of the Initial Decision herein, effected by an order of the Commission, released August 3, 1961, in connection with the co-channel application of Radio Americana at Baltimore, Maryland, and competing applications at Catonsville, Maryland. Tidewater and Fischer, the applicants in the instant proceeding, were innocent bystanders in the complicated and litigious proceeding involving the application of Radio Americana, which was the basis of the stay of consideration of this proceeding for more than three and a half years. 4/ During this interval the two events above referred to, and of major importance to this proceeding, occurred, i.e., increase in power of Station WESR and adoption of the new overlap Rule, in that chronological order.

6. It is noted that at the time the record was reopened - as well as at the time the power increase to WESR was granted - and the issue added which referred to "Section 73.35(a)", Section 73.35(a) read as follows:

> "Multiple ownership. No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:
>
> "(a) Such party directly or indirectly owns, operates or controls another standard broadcast station, a substantial portion of whose primary service area would receive primary service from the station in question, except upon a showing that public interest convenience and necessity will be served through such multiple ownership situation;"

4/ The order of stay was released August 3, 1961, and the stay was lifted by order released March 4, 1965, after the dismissal of the Radio Americana application and the imposition of a condition that, in the event of a grant to any of the named other applicants whose applications are similarly situated in some respects to that of the application of Radio Americana, but filed years later, such applicants must accept whatever interference would be caused by a grant of either the Tidewater or the Fischer proposal involved in this proceeding. Whether the Radio Americana saga is, even now, actually at an end may be debatable, since there is now pending before the Commission a petition for reconsideration of the action dismissing the Radio Americana application.

The present Rule was not adopted until May 20, 1964, did not become public knowledge until June 9, 1964, and did not become effective until July 16, 1964.

7. While prior to amendment of Section 73.35, Section 73.35(a) was couched in terms prohibiting parties from owning, controlling, or operating standard broadcast stations if their primary service contours overlapped substantially, the new amendment bars overlap of the predicted 1 mv/m service contours between commonly owned or controlled standard broadcast stations. In the Report and Order adopting the present Rule (Docket No. 14711; FCC 64-445; 2 RR 2d, 1588, 1603), the Commission stated that,

> "The new rules will be effective as to pending applications, including hearing cases, as well as new applications."

In the Report and Order, supra, page 1602, reference was also made to comments raising questions as to situations where the overlap might occur over water or in a desert. In this connection the Commission said,

> "For the most part, these hypothetical problems are highly speculative and, to the extent that one or more may ever materialize, are subject to individual examination upon requests for waiver of the rule."

Another important action of the Commission in connection with the applicability of the Rule here under consideration is contained in a Public Notice, 5/ entitled "Applicability of New Broadcast 'Duopoly' Rules", adopted July 8, 1964, and released July 9, 1964, in which it was announced by the Commission that,

> "The Commission today decided that applications in hearing status concerning which a Hearing Examiner had released an Initial Decision prior to June 9, 1964, will be treated as an exception to this policy and will be disposed of under the old overlap rules in effect prior to July 16, 1964."

8. The question of the applicability of the present Section 73.35(a) of the Rules was raised during the further hearing in the instant proceeding and was argued at some length. The Hearing Examiner, after observing that the question was a close one, ruled that Tidewater should adduce evidence relative to the overlap matter, so that this proceeding

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5/ While this was denominated "Public Notice", its text clearly shows that it was, in fact, a formal action of the Commission expressed in the exact language of the Public Notice.

would not have to be remanded again for the taking of further evidence, in the event that some higher forum should hold the 1964 amendment applicable to the Tidewater proposal.

9. Separate and apart from the close question of the applicability of the present Rule to this proceeding, particularly in view of the Public Notice of the Commission of July 9, 1964, factors exist which support the request for a waiver of the Rule. One is the fact that a major portion of the overlap occurs in Chesapeake Bay and over uninhabited marsh lands immediately adjacent thereto, and the other is the separate and distinct relationship of the communities, separated as they are by bodies of water. This would appear to be one of those situations to which the Commission had reference in the Report and Order adopting the Rule, supra, as being a proper matter for individual examination upon request for waiver of the Rule.

10. On the other side of the coin is the fact that, subsequent to the issuance of the Initial Decision but prior to the adoption of the new Rule, the principal owners of Tidewater and Station WESR requested, and were granted, increase in power for Station WESR, which, in turn, created the 1 mv/m overlap question and, as a concomitant action, Tidewater petitioned to reopen the instant proceeding and to have the new issue now under consideration added. The petition to reopen and add issue was filed by Tidewater on March 16, 1964, and was acted on by the Commission on April 30, 1964, at a time when the request for increase in power at WESR was pending. In fact, the WESR power increase application was granted on May 6, 1964, about one week after this record was reopened and the issue added. It must be remembered, however, that all of this took place prior to the adoption of the amendment 6/ and, particularly, prior to the Commission's interpretative Public Notice of July 9, 1964, in which it was unequivocally stated that the new Rule would not apply to applications in which Initial Decisions had already been issued.

11. After a careful consideration of the entire record in this proceeding, particularly as reflected in the foregoing findings, it is concluded that Tidewater Broadcasting has met the criteria of Section 73.35(a) effective at the time the record was reopened and the new issue added. As has already been indicated, there is serious doubt as to whether the amendment to Section 73.35(a), adopted in late May, released in early June, and effective July 16, 1964, is applicable to the Tidewater proposal, especially in view of the formal action of the commission as shown in the Public Notice adopted July 8, 1964, and released July 9, 1964; and if it should later be held that such amendment

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6/ Notice of Proposed Rule Making does not, of course, constitute adoption action and, furthermore, it is well established that numerous proposed rules have not been finally adopted.

is applicable, it is believed that Tidewater has met the burden necessary for a waiver of such Rule, and the evidence developed at the further hearing in connection with the new issue is not sufficient to disturb the disposition of this proceeding made in the Initial Decision, released July 11, 1961.

IT IS, THEREFORE, ORDERED, This 16th day of April, 1965, that the ordering paragraph contained in such Initial Decision is hereby reaffirmed.

Elizabeth C. Smith
Hearing Examiner
Federal Communications Commission

Released: April 19, 1965
and effective 50 days thereafter, subject to the provisions of the Rule cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

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WILLIAM R. BERNTON
C. THEODORE MALLYCK

STERLING 3-7371

January 3, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C. 20554

For Commission Action

In re: 1) Application of Edward R. Fischer for a new station in Newport News, Va. (Docket 13248)

2) Application of A-C Broadcasters for a new station in Annville-Cleona, Pa. (Docket 14440).

Dear Mr. Waple:

On December 27, 1965, the Commission released a "Policy Statement on Section 307 (b) Considerations" (Public Notice 77438, FCC 65-1153), relating to applications for standard broadcasting facilities involving suburban communities. The new policy embodied in this "Statement" may well have a serious impact on two applications represented by this office that are both under consideration by the Commission itself. One case involves the application of Edwin R. Fischer for a new AM station at Newport News, Virginia, (BP-13114, Docket No. 13248), which application was filed on May 15, 1959, and designated for hearing on October 28, 1959.1/ The other application is that of A-C Broadcasters for a new AM station at Annville-Cleona, Pa. (BP-14890, Docket No. 14440), which application was filed on April 28, 1961, and designated for hearing on December 20, 1961.2/

It is the intent of this letter to show that an immediate grant of both applications would be consonant with the objectives of the Commission's new 307 (b) policies referred to above; would serve the public interest by providing the cities of Lebanon, Pa. and Newport News, Virginia, with their second local transmission service;3/ and

---

1/ The Fischer application is mutually exclusive with the application of The Tidewater Broadcasting Company, Inc. requesting identical facilities for Smithfield, Va. (Docket No. 13243) and came before the Commission for oral argument on December 9, 1965 on exceptions to the Initial Decision and Supplemental Initial Decision.

2/ The A-C application is mutually exclusive with the application of Saul M. Miller, requesting the same facility for Kutztown, Pa. (Docket No. 14425). It is before the Commission on Application for Review from Decisions of the Review Board.

3/ In the case of Newport News, this presumes the finalization of a pending Initial Decision to deny the renewal application of Station WTID, Newport News, Va. (Docket No. 15983).

would benefit the administrative process by bringing to a conclusion two hearing proceedings that are now 6 and 4 years old, respectively.

NEWPORT NEWS

In the oral argument recently held before the Commission in connection with the Fischer and Tidewater applications, the undersigned set forth numerous reasons why the Smithfield application should be denied -- the most important one being the Commission's rule and policy prohibiting significant overlap of the service areas of commonly-owned stations. Since the Smithfield application must be denied on this ground alone, and since Fischer has been held to be a fully qualified applicant, all Section 307 (b) considerations would normally be rendered moot; and the Fischer application for Newport News would be automatically granted.

However, since the 5 mv/m contour of the Fischer proposal for Newport News does penetrate the city of Norfolk, and since the procedural posture of the instant case is not unlike that in Jupiter Associates, Inc. (Dockets 14755, et al.), the Commission may be contemplating remanding the Fischer application for further hearing under its new Policy on Sec. 307 (b) as was done by its December 27th Memorandum Opinion and Order in Jupiter Associates, Inc. (FCC 65-1156, Mimeo 76956). It is our hope, however, that this letter may persuade the Commission that such action is wholly unnecessary.

Based on the Commission's action in Jupiter Associates, Inc. (supra), the new issues under Sec. 307 (b) that would have to be resolved with respect to the Fischer application would be the following:

1. Ascertainment of the separate and distinct program needs of Newport News.

2. Extent to which such needs are being met by existing standard broadcast stations.

3. Extent to which Fischer's program proposal will meet such needs.

4. Extent to which Fischer's advertising revenues will come from Newport News and Norfolk, Virginia, respectively.

These questions will be discussed seriatim below.

I.

1. The separateness of Newport News from Norfolk is an established geographic and political fact. Newport News is situated at the southern tip of the Virginia Peninsula, which is separated from the mainland by the James River on the west and Hampton Roads (the entrance

to Norfolk Harbor) on the south. The only road connections between Newport News and Norfolk are over the James River Bridge (toll $0.90) and, via Route 17, through Portsmouth (a total of almost 30 miles to downtown Norfolk) or the more direct route via the Bridge-Tunnel (toll $1.25), which is still about ten miles to downtown Norfolk. (See map attached.)

2. Newport News is, of course, a political entity, separate and apart from Norfolk. The present city of Newport News represents the consolidation, on July 1, 1958, of what had previously been the separate cities of Newport News and Warwick (Fischer Exh. 4, p. 2.) The city as so constituted has an area of 64 square miles (Ibid. p. 1) and a 1960 Census population of 112,832 (Ibid. p. 3). It is an "Independent City", governed by a seven member City Council and administered by a City Manager whom the Council appoints. The Council elects the School Board, a city Clerk, Judges of the lower courts, City Attorney, City Auditor and members of the city's various boards and Commissions. (Ibid. p. 9.)

3. The Bureau of the Budget has established five Standard Metropolitan Statistical Areas within the Commonwealth of Virginia. The Norfolk-Portsmouth SMSA lies south of Hampton Roads. Newport News, however, is one of the principal cities of the Newport News-Hampton SMSA, located on the Virginia Peninsula, and composed of the cities of Newport News and Hampton and York County. Hampton, like Newport News, is an "Independent City", unassociated with any county.

4. Similarly, the Bureau of the Census has recognized six separate Urbanized Areas within the Commonwealth of Virginia; and, again, there is a Norfolk-Portsmouth Urbanized Area south of Hampton Roads and a Newport News-Hampton Urbanized Area to the north.

5. The ~~Federal Communications~~ Commission itself recognizes Newport News-Hampton as a separate radio market; and, in its annual reports of "AM-FM Broadcast Financial Data", lists "Newport News-Hampton" separately from "Norfolk-Portsmouth". Even when one of the stations in the Newport News-Hampton market failed to qualify for a listing in the annual AM-FM Financial Report for 1964, there were only two AM stations to be listed for that market for that year, and Commission policy precluded the publication of their figures, the report still listed the Newport News-Hampton market separately (without giving any figures for it) rather than consolidating the figures for the stations there with those of the Norfolk-Portsmouth market.

6. This separateness, recognized by the Commission itself, by itself bespeaks the need for separate and distinct programming for Newport News and the Newport News-Hampton area.

II.

Within the Newport News-Hampton SMSA and Urbanized Area, there are three commercial AM stations operating:

WGH, licensed to Newport News, and operating with 5 KW power, fulltime, on the frequency 1310 KC. The licensee corporation is owned by Daily Press. Inc., publisher of the only morning, evening and Sunday newspaper in Newport News.

WTID, licensed to Newport News and operating with 1 KW, daytime-only, on the frequency 1270 KC.

WVEC, licensed to Hampton, and operating with 250 watts power, fulltime, on the frequency 1490 KC.

As indicated in footnote 3, supra, there is an Initial Decision outstanding looking towards a denial of the WTID application for renewal of license for failure of prosecution (Docket 15983, BR-1749). A Memorandum Opinion and Order of the Commission, released September 22, 1965 in this same proceeding, looks towards this same result, so it can be assumed that Newport News will shortly be left with only one station (WGH) and the Newport News-Hampton market with only two.

Obviously one station will be insufficient to serve the needs of a city the size of Newport News and, two stations will be insufficient to serve the Newport News-Hampton market. The population over the years of Newport News, Hampton and York County (the three component parts of the Newport News-Hampton SMSA) has been as follows:

	Newport News (including Warwick)	Hampton	York County	Total
1900	24,523	19,460	2,444	46,427
1910	26,246	21,225	7,757	55,228
1920	47,013	25,249	8,046	80,308
1930	43,246	26,217	7,615	77,078
1940	46,315	38,181	8,857	93,353
1950	82,233	60,994	11,750	154,977
1960	113,662	89,258	21,583	224,503

Moreover, a comparison of the populations and other indices of activity between the Newport News and Norfolk markets shows that Newport News will have a far greater need than Norfolk for an additional station.

The Bureau of Census 1962 County and City Data Book shows that: 1) The population of the Newport News-Hampton Urbanized Area is 29.1% of the combined populations of the Newport News-Hampton and Norfolk-Portsmouth Urbanized Areas; 2) The population of the Newport News-Hampton SMSA is 27.6% of the combined population of the two SMSA's; 3) The bank deposits in the Newport News-Hampton SMSA as of 1960 represented 29% of the total in both SMSA's; 4) The Retail Sales of the Newport News-Hampton SMSA as of 1958 represented 27.3% of the total; and 5) The total civilian labor force in the Newport News-Hampton SMSA as of 1960 was 30.2% of the total in both.

According to the Commission's 1964 report on AM-FM Broadcast Financial Data, the Norfolk-Portsmouth SMSA was credited with 7 AM stations and the Newport News-Hampton SMSA with 3, including WTID. Assuming the ultimate denial of the WTID renewal application and a grant of the instant application, a Newport News station, the number of stations in both markets would remain the same.

If the Commission were to ascribe the instant application to Norfolk it would have the effect of ascribing 80% of the facilities of the two markets to the Norfolk SMSA. However, the population figures and other indices of need set forth above show that Newport News-Hampton has a need for 30% of the total facilities of the two markets, and that Norfolk's need will be satisfied with 70%, which is exactly what will obtain from treating the instant proposal, as it should be, as a proposal to replace WTID in Newport News. Only in this way will the legitimate and separate needs of Newport News and the Newport News-Hampton SMSA be satisfied.

III.

The record in this proceeding shows that, although the programming of the Fischer proposal was designed, in part, to meet the needs of the rural areas on the west bank of the James River, its primary thrust was to meet the needs of the Virginia Peninsula, on which Newport News is situated.

Fischer Exhibit 11 sets forth the details of this applicant's program policy. It features "Coverage in Depth" of relevant news stories, to be broadcast by personalities to be known as the station's "Reporters". Two individuals will be assigned as the "Hampton Roads Reporter", and together will have eight 5 minute programs daily and seven on Sunday. Their "beat" will be Newport News and the other parts of the Virginia Peninsula. They will handle broadcasts of local news, calendars of local events, promotion of projects of civic and charitable organizations and "Five Minute Features" which will be brief essays giving "Coverage in Depth" treatment to items of local importance.

Important duties of the Reporters will include the station's liaison with local civic and charitable organizations; another duty will be to obtain and produce interviews with "very important persons" visiting the area.

Because of the large number of Governmental installations in the area, principally military in nature, a five minute period of military news has been scheduled each day.

Educational programming will center around a "School Board" program which will deal primarily with the problems of education, educators and educational institutions. The Superintendent of Schools of Newport News was contacted and indicated interest in participating in this program. The "Hampton Roads Forum" was projected as a weekly discussion program that would deal primarily with local subjects.

In connection with the development of his program, Mr. Fischer personally contacted a total of 132 organizations, of which 49 related to Newport News exclusively, 6 to Hampton and 9 to York County. Thirty-two others were "Lower Peninsula" organizations which did not restrict their activities to any single community or part of the metropolitan area. A total of 52 of these organizations gave Mr. Fischer promises of assistance in programming or statements of an intent to use the station's facilities. Of these, 41 were organizations identifying themselves with Newport News or other parts of the Peninsula. Of the remainder, 8 came from organizations on the West Bank of the James River, one from Gloucester and only two from Norfolk. (Fischer Exhibit 6.) The foregoing is ample evidence that the Fischer proposal intended to, can, and will, meet the specific needs of Newport News and adjacent areas.

IV.

It is, of course, true that Station WTID, Newport News, has gone into bankruptcy. This does not mean, however, that Newport News cannot support its second station or the Newport News-Hampton SMSA support its third. The figures are to the contrary, so that it must be assumed that WTID's difficulty arose either:

a) because it could not command a fair share of the market, or

b) because the debt load imposed on it by prior owners was so excessive that it could not be serviced with reasonable revenues.

As indicated above, no figures for the Newport News-Hampton market have been made public for 1964. However, the figures for 1963, 1962 and 1961 are available; and they show the following:

1. a. In 1961, the broadcast revenues of the three stations in the Newport News-Hampton market represented 28.7% of the broadcast revenues of the ten stations in the two markets of Newport News-Hampton and Norfolk-Portsmouth.

   b. In 1962 the revenues of the three Newport News-Hampton stations represented 29.6% of the total revenues of the ten stations in the two markets.

   c. In 1963 the revenues of the Newport News-Hampton stations represented 29.0% of the combined revenues of the two markets; and

2. a. In 1961 the average broadcast revenue of the three AM stations in the Newport News-Hampton market was 94% of the average revenue of the seven stations in the Norfolk-Portsmouth market and 95% of the average revenue of all stations located in Metropolitan Areas.

b. In 1962 the average revenue of the Newport News-Hampton stations was 98% of that of the Norfolk-Portsmouth stations and 96% of the national average for stations in Metropolitan Areas.

c. In 1963 the average of the Newport News-Hampton stations was 95% of that of the Norfolk-Portsmouth stations and 94% of the national average for stations in Metropolitan Areas.

Based on these figures, and the retail sales figures referred to above (showing that Newport News-Hampton has 27.3% of the total retail sales of both markets) it is clear that Newport News is holding its own as a radio market, both with respect to Norfolk-Portsmouth and with respect to the national average; that it has its fair share of the retail sales of the two markets and that it can support 30% of the total radio facilities assigned to both markets.

On the basis of the foregoing, it is respectfully submitted, the Fischer application can, and should, be considered as an application for a Newport News facility, notwithstanding the fact that its 5 mv/m contour does penetrate the city of Norfolk; but that -- in view of the disqualification of the Tidewater application for reasons of overlap, it should be granted without regard to what city the Commission ascribes it for purposes of Sec. 307 (b).

LEBANON, PA.

The A-C Broadcasters application for Annville-Cleona, Pa. is mutually exclusive with the application of Saul M. Miller for Kutztown, Pa. The Examiner once, and the Review Board, twice, have found Saul M. Miller lacking in the requisite character qualifications to be a Commission licensee. An Application for Review has been filed with the Commission for review of this determination. It is fair to presume that the Commission will likewise find Saul M. Miller to be disqualified. Consequently the application of A-C Broadcasters could be granted, as the Hearing Examiner recommended, by reversing the Review Board's two-to-one holding that the "Suburban Issue" and "Dual City Identification" issue required a denial of A-C Broadcasters' application.

In its own Application for Review now pending before the Commission, A-C Broadcasters has amply set forth reasons why the Review Board's majority opinion was wrong in its "Suburban Issue" holding. Now the Commission's new 307 (b) policy renders moot the "Dual City Identification" issue. In Par. 4 of its Memorandum Opinion and Order in Jupiter Associates, Inc., referred to above, the Commission held that an applicant "who fails to establish that it will realistically serve its specified station location under the programming and revenues issue will be deemed to propose to serve the most populous community whose geographic boundaries

are penetrated by its 5 mv/m daytime contour," and an issue will be added to determine whether such applicant "meets all of the technical provisions of our rules including Sections 73.30, 73.31 and 73.188(b)(1) and (2), for a station assigned to the appropriate larger community." The 5 mv/m contour of the A-C Broadcasters proposal includes all of the City of Lebanon and, under new Section 307 (b) policy, the Commission may well treat this proposal as one for Lebanon, Pa. rather than for the communities of Annville and Cleona which are now specified. In determining whether this proposal would qualify as a Lebanon station under Sections 73.188(b)(1) and (2), it is necessary only to determine if it would place a 25 mv/m signal over Lebanon's business districts and a 5 mv/m signal over entire residential area of Lebanon. As shown in Figure 12A, attached hereto, the A-C Broadcasters' proposal does meet these criteria of the Rules. Since the main studio will be located at the transmitter site, the requirements of Sec. 73.30 and 73.31 are likewise satisfied. Consequently, there is no bar to the A-C Broadcasters' proposal being granted as a Lebanon operation if Commission policy should consider it as such. In doing so, the Commission would be providing the City of Lebanon with a population in excess of 30,000 with its second local transmission service and its third reception service, and would provide Lebanon County with a population in excess of 90,000, with its second transmission service and some portions of the county with its fifth reception service.

In view of the foregoing, an immediate grant of the two subject applications would be consonant with the objectives of the Commission's new 307 (b) policies referred to above; would be in the public interest by providing the cities of Newport News, Virginia, and Lebanon, Pa. with a second local transmission service (assuming a denial of the WTID renewal application); and would benefit the administrative process by bringing to a conclusion two hearing proceedings that are now 6 and 4 years old, respectively.

Respectfully submitted,

MALLYCK & BERNTON

By William Burton

Attachments

cc: Hon. E. William Henry, Chairman
Hon. Rosel H. Hyde
Hon. Robert T. Bartley
Hon. Robert E. Lee
Hon. Kenneth A. Cox
Hon. Lee Loevinger
Hon. James J. Wadsworth

Robert M. Booth, Esq.
Counsel for Saul M. Miller and
The Tidewater Broadcasting Company, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-61
77647

In re Applications of	)	
	)	
THE TIDEWATER BROADCASTING COMPANY, INCORPORATED	)	DOCKET NO. 13243
	)	File No. BP-12814
Smithfield, Virginia	)	
	)	
EDWIN R. FISCHER	)	DOCKET NO. 13248
Newport News, Virginia	)	File No. BP-13114
	)	
For Construction Permits	)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Cox not participating.

1. This proceeding involves the applications of The Tidewater Broadcasting Company, Incorporated (Tidewater) and Edwin R. Fischer (Fischer) to establish new standard broadcast stations at Smithfield and Newport News, Virginia, respectively, each to operate as a Class II station on the frequency of 940 kc, with a power of 10 kw, daytime only.

2. An Initial Decision, FCC 61D-102, released July 11, 1961 and a Supplemental Initial Decision, FCC 65D-16, released April 19, 1965, proposed grant of the Tidewater application for Smithfield. Oral argument on exceptions to the Initial and Supplemental Decisions was heard before the Commission en banc on December 9, 1965.

3. Although, as will appear hereinafter, this proceeding must be remanded for further hearing in light of our new policy on Section 307(b) considerations,1/ we think that we should resolve at this juncture an outstanding multiple ownership question so that the parties hereto may be aware of the Commission's disposition of this matter. The multiple ownership question treated in the Supplemental Initial Decision is whether grant of the Tidewater proposal would be contrary to the provisions of Section 73.35(a) of the Commission's Rules and whether circumstances exist which would justify waiver of the Rule. The Examiner concluded, among other things, that the provisions of Section 73.35(a) should be waived.

1/ Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (FCC 65-1153). released December 27, 1965.

Her findings and conclusions in the Supplemental Initial Decision are adopted, except for the ordering clause. Fischer exceptions to the Supplemental Initial Decision Nos. 1-4 inclusive, 6-9 inclusive, and No. 10 to the extent that it disagrees with the Examiner's conclusion to waive the multiple ownership rule, are denied. Exception No. 1 of the Chief, Broadcast Bureau and Tidewater exceptions Nos. 1 and 2 to the Supplemental Initial Decision are also denied.

4. After the inclusion on April 30, 1964 of the multiple ownership issue in the proceeding, the Commission issued its Report and Order (Docket No. 14711, FCC 64-445, released June 9, 1964) amending its multiple ownership rules. Although the Commission later released a Public Notice (FCC 64-636, July 9, 1964) relaxing the applicability of the new rules to applications which were in hearing status and which were the subjects of initial decisions prior to June 9, 1964, the relaxation did not apply to the instant case because the 1961 Initial Decision did not consider the multiple ownership question. The Examiner allowed an evidentiary showing under both the old and new multiple ownership rules, and in her Supplemental Initial Decision made findings under both. While we are of the view that the new rules with their more stringent requirements apply to this proceeding, we agree with the Examiner's conclusion that waiver of these rules (Section 73.35(a)) is warranted. The overlap of the 1 mv/m contour of the Tidewater proposal for Smithfield and that of Station WESR, Tasley, Virginia, in which two of Tidewater's principals own interests, will occur mainly over a large body of water and adjacent, uninhabited marsh lands. The overlap was occasioned in large measure by the substantial salt water paths of high conductivity which occur between Smithfield and Tasley. Moreover, separated as they are by large bodies of water, Smithfield and Tasley are clearly separate and distinct communities. Thus, we hold that the overlap of 1 mv/m contours does not bar a grant of the Tidewater application.

5. Our examination of the Tidewater and Fischer applications discloses that both applicants' proposed 5 mv/m daytime contours will penetrate the geographic boundaries of at least one other community of over 50,000 persons and with a population at least twice as large as that of each applicant's specified station location. Accordingly, we are persuaded for the reasons enunciated in our Policy Statement, supra, that a determination should be made in the proceeding whether each of these suburban proposals will realistically serve its own specified station location or some other larger community. We shall therefore revise the issues in this proceeding so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city (much of which has already been adduced), the parties may fully explore all matters relating to the need for each of these proposals. Thus, each of the applicants will be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations,

and the extent to which its program proposals will meet these needs. Additionally, each of the applicants will be expected to adduce evidence as to whether the projected sources of advertising revenues from within its specified station location are adequate to support its proposals as compared with its projected sources from all other areas.

6. An applicant who fails to establish that it will realistically serve its specified station location under the programming and revenues issue will be deemed to propose to serve the most populous community whose geographic boundaries are penetrated by its 5 mv/m daytime contour, unless the evidence establishes that it will realistically serve a third community whose boundaries are penetrated by its 5 mv/m daytime countour. 2/ Accordingly, an issue will also be added to determine whether these applicants meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for a station assigned to the appropriate larger community. Finally, the burden of proof with respect to these additional issues will be upon the individual applicants in each instance. 3/

ACCORDINGLY, IT IS ORDERED, This 19th day of January , 1966, that this proceeding IS REMANDED to Hearing Examiner Elizabeth C. Smith for further hearing and for preparation of a Supplemental Initial Decision consistent with this Memorandum Opinion and Order; and

IT IS FURTHER ORDERED, That the issues in this proceeding ARE HEREBY ENLARGED as follows:

(a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

2/ See paragraph 11 and especially footnote 1 appended thereto of our Policy Statement, supra, for the effect of such service to a third community.

3/ The Commission notes that Fischer in a letter of January 3, 1966 has alleged, on the basis of information set forth therein, that grant of his proposal is consonant with our Policy Statement, supra, and remand is unnecessary. However, Fischer's contentions are premised upon his view that the Tidewater application must be denied because of the multiple ownership question, and that since he is a "fully qualified applicant all Section 307(b) considerations would normally be rendered moot; and the Fischer application for Newport News would be automatically granted." Since we hold that Tidewater is not disqualified under the multiple ownership issue, and that waiver of the provisions of Section 73.35(a) is warranted, we are of the view that remand and further hearing is required as to both the Tidewater and Fischer proposals.

(1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;

(2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;

(3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

FEDERAL COMMUNICATIONS COMMISSION *

Ben F. Waple
Secretary

Released: January 20, 1966

* See attached Dissenting Statement of Commissioner Bartley

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent to the remand.

Tidewater is in violation of Section 73.35(a) of our Rules on multiple ownership, and, in my opinion, justification for a waiver has not been shown.

As stated by the Broadcast Bureau in its exceptions, a waiver is not warranted where, as here, there is no demonstration of a compelling public need. Dover Broadcasting Company, Inc. FCC 65-404, May 13,1965.

In the remand order, a waiver rests on the overlap occurring over a large body of water and uninhabited marshland; and on Smithfield and Tasley being separate and distinct communities. However, substantial overlap occurs also over inhabited land, affecting 48% of the population in WESR's interference-free contour and 5.7% in Tidewater's. Moreover, WESR's being the only station in Tasley and on the Virginia Eastern Shore militates against a waiver.

With the disqualification of Tidewater under Section 73.35(a), there is no need for Fischer to submit further evidence pursuant to our 307(b) Policy Statement, and I would grant the Fischer proposal.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 67D-1
94457

In re Applications of	)	
	)	
THE TIDEWATER BROADCASTING COMPANY, INCORPORATED	)	DOCKET NO. 13243 File No. BP-12814
Smithfield, Virginia	)	
	)	
EDWIN R. FISCHER	)	DOCKET NO. 13248
Newport News, Virginia	)	File No. BP-13114
	)	
For Construction Permits	)	

Appearances

Robert M. Booth, Jr. on behalf of The Tidewater Broadcasting Company, Incorporated; William P. Bernton and E. Theodore Mallyck on behalf of Edwin R. Fischer; Larry M. Berkow and Ernest Nash on behalf of the Broadcast Bureau of the Commission.

SECOND SUPPLEMENTAL INITIAL DECISION OF HEARING EXAMINER ELIZABETH C. SMITH

Preliminary Statement

1. In view of the protracted length of this proceeding, a brief resume of its history will be helpful. The two above-styled applications were filed in February and May 1959, respectively, and were originally designated for hearing on October 28, 1959 -- more than seven years ago. The October 1959 Order of Designation also set for hearing some 30 other applications for the same or similar facilities in other areas, along with the two instant ones. By reason of mesne severances and grants of certain of the applications, and amendments or dismissals of others, the original multi-party proceeding was severed into a number of smaller proceedings, one of which is here under consideration.

2. The hearing with respect to the originally specified issues relating to the two instant applications was held and the record thereon was closed by order released March 10, 1961. Initial Decision was thereafter issued on July 5, 1961 (FCC 61D-102). (The text of the issues relating to Tidewater and Fischer specified in the original Order of Designation of October 1959 is set forth on pages 2, 3 and 4 of such Initial Decision and the findings and conclusions based upon the hearing record with respect thereto, as set forth in such Initial Decision, are reaffirmed herein.)

3. Subsequently, on August 3, 1961 (FCC 61-935), the Commission en banc, on its own motion, issued an order staying consideration of the two instant applications "pending further review by the Commission." On September 13, 1961, consideration of the Tidewater and Fischer applications was again stayed by the Commission en banc (in Memorandum Opinion and Order involving the application of Radio Americana, Inc., Docket No. 13245, FCC 61-1100). Petition to lift the stay was denied by the Commission on November 15, 1962 (FCC 62-1176).

4. No further action was taken in this proceeding until April 30, 1964, when the Commission issued an order (FCC 64-355 corrected) which reopened the record and directed that a further hearing be held on a newly specified issue. 1/ The order of remand also provided that "/T/he stay is to remain in effect until further order of the Commission."

5. The hearing with respect to the new issue specified in the first remand order (FCC 64-355) was held on various dates in May, September, and November, 1964 and the record closed on November 30, 1964. The Supplemental Initial Decision with respect to the additional issue specified in the order of remand, and based upon the evidence adduced at the further hearing, was issued April 19, 1965 (FCC 65 D-16). Thereafter, oral argument on exceptions to both the Initial Decision and the Supplemental Initial Decision was heard before the Commission en banc on December 9, 1965.

6. On January 20, 1966, a Memorandum Opinion and Order of the Commission was released in which the findings and conclusions of the Supplemental Initial Decision were adopted by the Commission, except for the ordering clause, and it was specifically held that the overlap of 1 mv/m contours does not bar a grant of the Tidewater application. In this same Memorandum Opinion and Order (FCC 66-61), the proceeding was remanded for the second time in order that a Policy Statement (FCC 65-1153) on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, and released December 27, 1965, may be applied to this proceeding. 2/

1/ Such issue required a determination of whether a grant of the proposal of Tidewater would be in contravention of the provisions of Section 73.35(a) of the Commission's Rules with respect to multiple ownership of standard broadcast stations; and, if so, whether circumstances exist which would justify waiver of the rule. The exact text of this issue is set forth on Page 2 of the Supplemental Initial Decision of April 1965. (FCC 65 D-16).

2/ This Policy Statement requires the determination of whether a suburban proposal will realistically serve its own specified station location or some other larger community where, as here, applicants' proposed 5 mv/m contours will penetrate the geographic boundaries of at least one other community of 50,000 persons and with a population at least twice that of a respective applicant's specified station location.

7. The issues in this proceeding were, accordingly, enlarged to add the following additional issues:

(a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;

(2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;

(3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

8. Subsequent to the second remand, further prehearing conferences were held on February 8, February 28, and May 11, 1966, and evidentiary hearings were held on May 17 and 18, June 21 and July 21, 1966, and the record closed on the last named date. Supplemental proposed findings of fact and conclusions of law were timely filed by both applicants and by the Broadcast Bureau, and reply thereto was timely filed by Tidewater.

Supplemental Findings of Fact

9. The supplemental findings hereinafter made are based upon evidence adduced at the further hearing held pursuant to the second remand order. The applications here under consideration request authorizations to establish new standard broadcast stations at Smithfield and Newport News, Virginia, respectively, to operate a Class II station on the frequency 940 kc, with a power of 10 kw, daytime only.

10. In view of the Commission's new policy relating to Section 307(b) considerations for standard broadcast stations in suburban communities, enunciated in December, 1965,3/ and since the proposed 5 mv/m contours of both applicants' proposals would penetrate the geographic boundaries of at least one other community of over 50,000 persons with a population at least twice as large as that of each applicant's specified station location, the issues in this proceeding were enlarged so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city (much of which had already been adduced), the parties might fully explore all matters relating to the need for each of their proposals in the light of such new policy and in order to rebut the presumption which flows from the fact that the proposed 5 mv/m contours encompass the more populous community.

11. Tidewater, applicant for a station at Smithfield, has sought to rebut such presumption and introduced additional evidence under Issue (a), looking to that end. Edwin R. Fischer, whose application specified Newport News as the site of his proposed station, introduced no evidence in this second remand proceeding under the new Issue (a) and, thus made no attempt to rebut the presumption that his proposal is in reality one for Norfolk and not for Newport News.

Tidewater Proposal

12. The Tidewater application specified Smithfield as its station location. This city has a population of 3,010 persons and is located in Isle of Wight County, which has a population of 17,164 persons. Neither Smithfield nor any part of Isle of Wight County is in an urbanized or metropolitan area. While Smithfield is a part of the Tidewater Virginia area, as are the nearby metropolitan or urbanized areas of Norfolk-Portsmouth, and Newport News-Hampton urbanized areas, it is situated across the James River from the Newport News-Hampton area, and across the James and Nansemond Rivers and the Hampton Roads portion of the Chesapeake Bay from the Norfolk-Portsmouth area.

3/Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities (FCC 65-1153) released December 27, 1965.

13. Smithfield and Isle of Wight County in which Smithfield is located are part of the Tidewater Virginia Area, which encompasses the southeastern corner of the State of Virginia and occupies about 3,000 square miles with a population of 800,000 persons. Such Area also includes, among other territory, the Norfolk-Portsmouth urbanized area and numerous nearby counties. Smithfield lies approximately 20 miles northwest of Norfolk and 10 miles west of Newport News.

14. In the Policy Statement, supra, the Commission specifically stated that where a proposal's 5 mv/m daytime contour would penetrate the geographic boundaries of more than one community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community, the presumption which must be rebutted will apply with respect to the largest of those communities only. Here, the 5 mv/m contour of Smithfield would encompass Newport News as well as Norfolk, but under such criterion and the facts of this case, consideration need be given only to Smithfield vis-a-vis Norfolk in a consideration of the Tidewater proposal.

Engineering Considerations

15. Detailed findings with respect to the engineering coverage of the Tidewater proposal are set forth in the July 1961 Initial Decision to which reference is made. 4/ The engineering evidence adduced at the second remand hearing shows the proposed Smithfield 25 mv/m and 5 mv/m contours. Conductivity values shown on Figure M-3 in the Rules and an inverse field intensity of 570 mv/m for the proposed Smithfield operation were used to determine such proposed contours. The equivalent distance method was used where variable paths of conductivity intervened. All water paths were assumed to have a conductivity of 5,000 mm/m. The Smithfield proposal places a 5 mv/m signal over all of the Newport News-Hampton urbanized area and all of the Norfolk-Portsmouth urbanized area. It places a 25 mv/m signal over a portion of Norfolk but not over the main business district thereof. It would, however, provide a signal intensity of 19.95 mv/m to the furthest portion of the Norfolk main business district.

16. The proposed station would render a primary interference free service to 1,016,238 persons in an area of 6,584 square miles, 5/ including all of the following counties in Virginia: Gloucester (11,919), Isle of Wight (17,164), James City (11,539), Mathews (7,121), Nansemond (31,366), Norfolk (51,612), Northampton (16,966), Princess Anne (76,124), Surry (6,220) and York (21,583); and Gates County (19,254) North Carolina. In addition to service to Smithfield

4/ See pages 10-11, paragraphs 20-24, of such Initial Decision.

5/ If the presently pending application of Catonsville Broadcast Company (BP-16105) is granted, the interference free primary service area of Tidewater would be reduced to an area of 5,642 square miles, having a population of 970,682 persons.

Tidewater would place a 2 mv/m or better signal over all of the cities of Norfolk (305,872); Portsmouth (114,773); Newport News (113,662); Hampton (89,258); Suffolk (12,609); and Virginia Beach (8,091), all in Virginia.

Needs and Characteristics of Local Community

17. In addition to the evidence adduced at the original hearing with respect to the distinct and separate needs and characteristics of the Smithfield community, 6/ at the further hearing this applicant adduced additional evidence under Issue (a) relating to the needs for a local transmission facility in Smithfield. This additional evidence was in the form of written testimony from some 26 civic leaders and other persons who either reside or work in Smithfield. An analysis of their testimony follows:

(a) Dr. A. C. Rogers, a veterinarian who lives in Smithfield and practices in five nearby counties, is president of a local feed company and also aids in the livestock management of several large local farms, testified that there are unfilled needs for notifying the people in these areas of epidemics and new advances in preventative medicine affecting the local livestock industry; that many times he has had a need to notify local people of matters of immediate concern to them and found that the only method was the local weekly newspaper 7/ which is often too late to be of much immediate assistance. Dr. Rogers is also president of the Smithfield Little Theater and active in local Boy Scout work. He testified that public service announcements (PSA's) would assist the local Boy Scouts and Little Theater; that announcements concerning various productions of the Smithfield Little Theater had been sent to and made over stations WLPM, Suffolk; WTAR and WNOR, Norfolk; WVEC, Hampton; WGH, Newport News; and WAVY, Portsmouth, and some of the players from the Smithfield Little Theater had appeared as guests on the WTAR, Mildred Alexander Show. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the Boy Scouts. He did not know of any request to or offer by an existing station for the broadcast of such announcements.

6/ See findings made in the July 1961 Initial Decision.

7/ As an example, Dr. Rogers testified that earlier in the month the hog raisers were struck with a severe virus in their baby pigs, causing the loss of thousands of such pigs. Because of this disease the income of many hog raisers will be adversely affected this year and this, in turn, will affect all business in the area. Had it been possible to notify the local hog raisers at once, he feels precautions might have been taken to keep the disease off of many farms. To his knowledge no radio station is now or has broadcast such information.

(b) According to Anne B. Driver, executive secretary of the Smithfield Chamber of Commerce, 8/ daily local news, commentary on area problems and local high school sporting events are not now being covered on a regular basis by any existing radio station and such programming is desirable; that on January 20 and 21, 1965, WTAR, Norfolk, Virginia, broadcast a 10-minute taped program "Operation Progress" sponsored and paid for by the Smithfield Chamber of Commerce which included interviews with the Chamber treasurer, the town mayor, and representatives of the two local packing companies. 9/ Other than this program, she had not considered use of a radio station by or on behalf of the Chamber of Commerce and she knows of no offer of air time ever having been made to the organization by an existing station.

(c) Francis E. Turner, who is employed by the Isle of Wight County Department of Public Welfare, testified that PSA's for her department are needed, but knows of no request having ever been made to or offer received from any radio station for broadcast of PSA's on behalf of her department. She had not considered use of a radio station by or on behalf of the County Welfare Department until a representative of Tidewater contacted her. According to Ruth E. Holland, the clerk of the Circuit Court of the Isle of Wight County who lives in the Isle of Wight Courthouse, PSA's are needed for the County Clerk's office. She knows of no request ever having been made to or offer received from any existing broadcast station to program such announcements. Until a representative of Tidewater contacted her relative to such announcements, she had not considered the use of a radio station by or on behalf of the County Clerk's office.

(d) According to Mary Newman Taylor, home economics extension agent for Isle of Wight County, PSA's and programs relating to improving homemaking practices are needed, but she knows of no request ever having been made to or offer received from any existing broadcast station for such programs or announcements. Until a representative of Tidewater contacted her relative to such programs and announcements, she had not considered the use of a radio station by or on behalf of the County Extension office.

8/ This organization will accept membership from a business and professional person in Isle of Wight County and in general considers any area of about five miles from Smithfield to be its sphere of influence.

9/ The Smithfield Area Chamber of Commerce paid WTAR $200.00 "for station time and for the payment of a WTAR announcer to come to Smithfield to interview Town Officials and area industrialists who appeared on the interview announcements made over WTAR."

(e) According to Mary W. Wells, who is employed by the Virginia Agricultural Extension Service as extension agent for home economics for the Isle of Wight County, PSA's and agriculture programming would be of value. She knows of no request having ever been made to or offer received from any existing broadcast station for such programs or announcements. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station by or on behalf of the County Extension office. Clarence H. Stith, extension agent, with the Virginia Agricultural Extension Service, testified that a radio station could be used for 4-H Club activity discussions and leader training. He knows of no request ever having been made to or offer received from any radio station for broadcasting of programs by or on behalf of the County Extension office. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the County extension office. Herbert L. Jones, the Isle of Wight Agricultural Extension Agent, testified that if a station is established in Smithfield, he can use it to advantage to broadcast programs to approximately 600 farmers in the county; that no request has ever been made to or offer received from any radio station for the broadcast of programs by or on behalf of the County Extension office because members of the staff do not normally go outside the county to appear on radio programs. However, one of the members of the Extension staff did appear on one 4-H Club program on WLPM, Suffolk, Virginia in 1965. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the County Extension office.

(f) A. T. Adams, supervisor of agricultural education for eastern Virginia and mayor of Smithfield, testified that the FFA (Future Farmers of America) members in Smithfield have used radio to broadcast information about their Club activities, but no radio station is now broadcasting information about the FFA on a regular basis, and likewise no station is now broadcasting news about Smithfield on a regular basis. He knows of no request having ever been made to or offer received from any station for broadcast of such programs and announcements. Until a representative of the Tidewater Broadcasting Company contacted him, he had not considered the use of a radio station by or on behalf of any of the FFA chapters in Isle of Wight County. Wayne C. Garst, the Extension Agent, Farm Management, for the southeast district of Virginia, is of the view that a local radio station could be used for interview programs and for PSA's. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had

not considered the use of a radio station by or on behalf of the Farm Management Division of the Extension Service and knows of no request having ever been made to or offer received from any radio station for broadcast for such radio programs or announcements.

(g) George F. Walls, the postmaster of Isle of Wight, Virginia, who lives near the Courthouse at Isle of Wight, Virginia, west of Smithfield, and is presently the director for Civil Defense for Isle of Wight County, is of the view that PSA's of the time and place of Civil Defense meetings and to alert the public in case of a disaster could be broadcast if a radio station were readily available in the county. Programs prepared by national authorities on National Civil Defense could also be broadcast. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight Civil Defense and he knew of no request having ever been made to or offer received from any radio station for broadcast of such radio programs or announcements.

(h) James O. Branch, the town manager of Smithfield, is of the view that a radio station would be "of great value and assistance in disseminating public information and announcements" for Smithfield activities. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the town of Smithfield and he knows of no request having ever been made to or offer received from any radio station for broadcast of such announcements.

(i) Franklin E. Hall, a resident of Smithfield and currently president of the Smithfield Junior Chamber of Commerce, is of the view that PSA's are needed for his organization. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered use of a radio station by or on behalf of the Smithfield JCC's, except in one instance which related to Smithfield Homecoming last year. WGH broadcast announcements requested by Smithfield in regard to this Homecoming. He knows of no other request ever having been made to or offer received from any radio station for broadcast of programs or announcements on behalf of the Smithfield JCC's.

(j) Robert J. Little, Jr., chief of the Smithfield Volunteer Fire Department, is of the view that PSA's would be of value in alerting volunteer firemen and in keeping citizens informed of each fire or life-saving call. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not

considered use of a radio station by the Smithfield Volunteer Fire Department and knows of no request having ever been made to or offer received from any radio station for broadcast of such programs or announcements.

(k) James W. Eavey is superintendent of all the schools in Isle of Wight County, including the Smithfield schools. He resides in Smithfield and testified that a local radio station could better handle the broadcast of announcements as to school closing and reopening due to inclement weather. Such announcements have been made on WRVA, Richmond, WTAR, Norfolk, WYSR, Franklin, and WAVY, Portsmouth. These announcements required a long-distance call to the home cities of these stations. No existing station is broadcasting programs relating to the Isle of Wight County school system. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight County Public Schools, other than in reference to announcements of closing and reopening due to inclement weather. He knows of no request ever having been made to or offer received from any radio station for the broadcast of other programs or announcements concerning the school system.

(l) Mrs. Charles W. White, president of the Smithfield Junior Woman's Club, is of the view that if a radio station is established in Smithfield, the station could be used to announce the Club's meetings and special events. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station by or on behalf of the Junior Woman's Club. She knows of no request having ever been made to or offer received from any radio station for broadcast of programs or announcements on behalf of her organization.

(m) Rodham T. Delk, former mayor of Smithfield, is of the view that a local radio station could be used for political broadcasts and for broadcasting of more extensive county news.

(n) A non-denominational national religious shrine, St. Luke's, is located in Smithfield. A. E. S. Stephens, a resident of Smithfield, is of the view that if a radio station could be established in Smithfield, it would be a wonderful opportunity to serve the area regularly by broadcasting joint religious services held at St. Luke's. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not considered use of a radio station by or on behalf of historical St. Luke's. He knows of no request having ever been made to or offer received from any radio station for broadcast of such programs.

(o) Joseph A. Barlow, a resident of Smithfield, a past president of the Ruritan Club and a member of the Board of Directors of the Isle of Wight County Farm Bureau, believes that if a radio station were established in this area, the Ruritan Club and Farm Bureau could make use of its facilities for broadcast of concerts of the Smithfield High School Band and to broadcast a portion of "Boys and Girls State" from Smithfield High School. The Farm Bureau could use a local radio station to broadcast important Farm Bureau news and members could appear on agricultural programs to discuss various farm problems and prices. Until a representative of Tidewater contacted him relative to radio programs and anncuncements, he had not considered the use of a radio station by or on behalf of the Farm Bureau. He knows of no request having ever been made to or offer received from any radio station for broadcasts of such programs or announcements.

(p) Adelaide Little Gee, a resident of Smithfield, is of the view that a local station could broadcast announcements for the Woman's Club of Smithfield. Until a representative of Tidewater contacted her relative to radio programs and announcements, she had not considered the use of a radio station on behalf of the Woman's Club of Smithfield, except in 1964, when the major stations in the area were requested to make announcements about an antique fair sponsored by the Woman's Club of Smithfield. Such announcements were broadcast. Aside from this instance, she knows of no request ever having been made to, or no offer received from, any radio station for broadcast of announcements on behalf of the Woman's Club of Smithfield.

(q) John H. Andrews, manager of the Colonial Funeral Home in Smithfield, is of the view that daily broadcasts of local obituary notices are needed. Until a representative of Tidewater contacted him relative to radio programs or announcements, he had not considered use of a radio station for broadcast of obituary notices. He knows of no request ever having been made to, or offer received from, any radio station for broadcasts of such notices on behalf of the Smithfield area.

(r) According to S. A. Petrino, a resident of Smithfield, if a radio station is established in this area, the Kiwanis Club could utilize its services to broadcast excerpts from their horse show and to broadcast non-denominational devotional messages from the National Kiwanis Office. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Kiwanis Club. He knows of no request having ever been made to or offer received from any station for broadcast of such programs.

(s) J. A. Everett, Jr., manager of the Smithfield office of the Home Telephone Company, is of the view that if a radio station could be established in the Smithfield area, it could announce to the public without delay warnings about hurricanes, ice storms, snow storms, and any other general disaster that would likely disrupt telephone communications. On May 15, 1966, as a result of a disastrous fire in Smithfield, telephones in the Smithfield area were temporarily disabled. He called WGH, Newport News, WTAR, Norfolk, and WLPM, Suffolk, to request that an announcement be made that service should be restored in about twenty-four to forty-eight hours. WTAR and WLPM made announcements as requested, but he did not get an answer from WGH. Later he learned that WGH had carried a story in its news that service would be out for three or four days. He contacted a WGH reporter and requested that announcements be made that service should be restored in twenty-four to forty-eight hours, and the announcement was made. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Home Telephone Co., except as above indicated.

(t) Warren F. Taylor, secretary of the Smithfield Area Ministers Association, is of the view that daily devotional messages by local pastors would be desirable and also that PSA's are needed. In past years, WGH and WTAR have made announcements, as requested, in connection with the closing of church services during snow storms. Until a representative of Tidewater contacted him relative to radio programs and announcements, he had not considered the use of a radio station by or on behalf of the Ministers Association, except insofar as announcements concerning the closing of churches due to inclement weather.

(u) Harold C. Taylor, the sheriff of Isle of Wight County, is of the view that if a radio station were established in the Isle of Wight area, he could use it to keep the people informed on an hourly basis announcing missing persons, stolen property, escapees and people wanted in violation of the law and to report to the people any disaster occurring in the area. Some of the stations in Norfolk and Newport News call him about big news stories such as a recent plane crash in Isle of Wight County, but that to his knowledge no radio station checks with his office on a regular basis. Until a representative of Tidewater contacted him relative to programs and announcements, he had not considered the use of a radio station by or on behalf of the Isle of Wight County Sheriff's Office.

(v) William A. Gwaltney, chairman of the Smithfield Planning Commission, is of the view that PSA's on behalf of such Commission are needed. Until a representative of Tidewater contacted him relative to radio announcements, he had not considered the use of a radio station by or on behalf of the Town Planning Commission.

18. Agriculture and livestock raising are the major components of the local economy. The Smithfield and Isle of Wight County area, while moving toward urbanization, is not now urbanized and relies heavily on farming in its economy. Farm equipment and supply businesses serve the agriculture interests and play an important role in the area's commerce. The raising of peanuts, hogs, corn and soybeans provide the livelihood of many residents. The processing of pork is the major industry of Smithfield, employing some fifteen hundred persons and handling about sixteen thousand hogs per week. The widely known Smithfield ham and many other pork products are produced in these local packing plants. Isle of Wight and other nearby counties produce pork for these meat packing plants. Likewise, the seafood industry plays an important role in the economic life of Smithfield and adjacent areas situated on the west side of the James River, that river and its tributaries providing fish, clams, oysters, and crabs which are processed in local plants.

Proposed Program Service

19. Extensive findings of fact concerning the program policies and proposals of the applicants appear in the Initial Decision (paragraphs 46, 47, 53 and 54). No additional evidence as to programming proposals was offered by either applicant.

The Extent to Which Existing Stations are Meeting Smithfield Needs

20. As found in the Initial Decision (paragraph 21 thereof), four existing standard broadcast stations provide a primary signal (2 mv/m or greater) to Smithfield: WRAP, 850 kc, 5 kw, and WTAR, 790 kc, 5 kw, both in Norfolk, Virginia; WGH, 1310 kc, 5 kw, and WTID (formerly WYOU), 1270 kc, 1 kw, daytime only, both in Newport News, Virginia.

21. Tidewater used two procedures in its effort to ascertain the service rendered by existing stations for and on behalf of organizations in the Smithfield community. First, the civic, charitable, agricultural, religious and service leaders of the community were asked (1) what offers of time or facilities had been received from existing stations, (2) what requests they had made for time on the facilities of existing stations, and (3) what use had actually been made of existing stations; and, second, written interrogatories were submitted to the stations which provide a 2 mv/m signal to Smithfield and a 0.5 mv/m signal to the surrounding rural areas.

22. Public witnesses, as found in paragraph 17, supra, testified that the organizations hereinafter named had not been offered, had not requested specifically, and had not used the facilities of a broadcasting station, except on the few occasions noted, even though each had a need for publicity or other services of a local radio station: Smithfield Rotary Club; Smithfield Boy Scouts; the Smithfield Chamber of Commerce, except for purchase of time on one Norfolk station; the Welfare Department of Isle of Wight County; the County Clerk's Office; the County Extension

Office of Isle of Wight County, except for one appearance on a 4-H Club program in 1965 on WLPM, Suffolk, Virginia;[10] Isle of Wight Civil Defense; the Town Government of Smithfield; the Smithfield Junior Chamber of Commerce; the Future Farmers of America Chapters in Isle of Wight County; the Office of the Mayor of Smithfield; the Smithfield Volunteer Fire Department; the Isle of Wight Public Schools, other than school closings in winter when long distance telephone calls are made by the school officials to Stations WRVA, Richmond, WTAR, Norfolk, WAVY, Portsmouth, WLPM, Suffolk, WYSR, Franklin, and WGH, Newport News; the Junior Woman's Club of Smithfield, the Smithfield Rotary Club and the Town Council of Smithfield; the Historical Society of St. Luke's, Smithfield; the Farm Management Division of the Agricultural Extension Service; the County (Isle of Wight) Farm Bureau; the Smithfield Ruritan Club; the Woman's Club of Smithfield, except for announcements of an antique fair by a "major station" of the area in response to a request; the Smithfield Recreation Association; the Colonial Funeral Home; the Smithfield Kiwanis Club; the Baptist Church and the Smithfield Ministers Association, except for announcements of closing of the Smithfield Baptist Church during snow storms made by Stations WTAR, Norfolk, and WGH, Newport News; the Isle of Wight County Sheriff's Office, except for telephone calls from Norfolk and Newport News stations on major events such as a plane crash in the county; and the Town Planning Commission of Smithfield. Many of the public witnesses gave specific examples as to how a local station could help their organizations' activities and objectives.

23. Replies to written interrogatories, in which the Broadcast Bureau joined Tidewater, were received from Stations WCMS, WRAP and WTAR, Norfolk; WGH and WTID, Newport News; WAVY, Portsmouth; WVEC, Hampton; and WBCI, Williamsburg. Of these stations, only WRAP, WTAR, WTID and WGH provide primary service (2 mv/m) to Smithfield. (Significant portions of the replies to the interrogatories made by these last four stations are set forth in Appendix A attached hereto and made a part hereof.)

24. Station WTID (1 kw), Newport News, does not provide any programming for Smithfield.

25. Station WGH, Newport News, has a high school correspondent in Smithfield who reports ball scores and school activities which are broadcast over the station. Public service announcements are broadcast on behalf of Smithfield organizations when requested and announcements as to school openings and closings during periods of inclement weather are broadcast upon request made - over long distance telephone - by the local Superintendent of Schools.

26. Station WRAP, Norfolk, broadcasts information concerning local weather and driving conditions in Smithfield and Isle of Wight County on the occasion of unusual or severe weather conditions. This information

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10/ WLPM does not provide primary service (a 2 mv/m signal) to Smithfield but does provide primary service (a 0.5 mv/m signal) to the rural areas around Smithfield. (Initial Decision, Findings, paragraph 21.)

is obtained from local officials and the state highway patrol. The station broadcasts PSA's in behalf of groups and organizations in Smithfield and Isle of Wight County. In the seven-day period preceding receipt of interrogatories, 15 PSA's were broadcast by the station on behalf of Smithfield groups and 20 on behalf of Isle of Wight County groups.

27. Station WTAR, Norfolk, broadcasts PSA's on behalf of organizations in Smithfield and Isle of Wight County; information as to school openings and closings for Smithfield and Isle of Wight County; and information as to driving conditions in Smithfield and Isle of Wight County during inclement weather. On special occasions, WTAR will broadcast directly from Smithfield. Station WTAR originated two days of broadcasting from Smithfield when the Smithfield Packing Co. plant opened recently. Students from Smithfield have participated in WTAR's "Prep Roundup" program.

28. WGH, WRAP and WTAR are regional stations serving the Tidewater Virginia area. Significant Smithfield news is reported in the stations' local (Tidewater Virginia) newscasts.

Projected Sources of Revenue

29. Vernon H. Baker, Tidewater's president, testified concerning the basis of his projections of revenue. Such projections were based upon his familiarity with Smithfield and the Tidewater Virginia area, and a list of business establishments in Smithfield and nearby towns, which he regarded as possible advertisers on the station, compiled from the classified section of the Smithfield Telephone Directory. Non-commercial and professional persons and organizations, such as doctors, dentists and churches, were not included in the list. Of the 156 business establishments listed, 101 were in Smithfield, 28 in Windsor, 15 in Crittenden, 11 in Chuckatuck, and 1 in Zuni. All of these communities are within the Smithfield local telephone exchange area and are located within 10 miles of Smithfield. Tidewater also adduced in evidence a report of the Smithfield Planning Commission entitled "Land Use, Population, and Economy"[11] which shows annual retail sales in Smithfield of $6,884,670, representing 57% of Isle of Wight County's total of $12,025,000. Wholesale establishments in Smithfield also conduct an annual sales volume of $466,382, which is approximately three-fourths of the total wholesale business in the County of Isle of Wight. Based upon his knowledge of the area and his experience[12] and studies, Dr. Baker estimated that 70%

11/ A publication of the Governor's Office, Commonwealth of Virginia, Division of Industrial Development and Planning, December 1962.

12/ Baker's experience has included operation of stations in small communities, including Station WESR at Tasley, on the Eastern Shore of Virginia. The Tasley station had first-year revenues of about $80,000 and by 1965 its revenues had increased to about $115,000. The population of the Tasley community is less than that of Smithfield and the interference-free population of Station WESR is many fold less than that within the operation proposed by Tidewater.

of the first year's revenues of $70,000 would come from local advertisers, i.e., "businesses within the Isle of Wight County area and adjacent areas." He also estimated that 5% of the total revenues would come from retail businesses in Norfolk and Newport News, and the remaining 25% would come from regional advertisers, i.e., ones selling their products throughout the area.

30. In connection with advertising revenues, it is noted that of the eight radio stations which responded to the interrogatories, three stations (WAVY, WTAR and WBCI) declined to answer the question relative to solicitation of advertising in Smithfield and Isle of Wight County, four (WCMS, WVEC, WGH and WTID) answered categorically in the negative, and one (WRAP) replied that advertising was not solicited on a regular basis in that area.

Fischer Proposal

31. Edwin R. Fischer specified Newport News as the station location in his application. The Fischer proposal will provide 5 mv/m service to all of Norfolk, Virginia, and will provide 25 mv/m service to 98% of the main industrial area and 47% of the main business district of that city. The balance of the main business district would receive a minimum signal of 17 mv/m. Fischer now states that he "is satisfied to have his application treated, under the new Sec. 307(b) criteria, by the standards applicable to a Norfolk[13] station. To that end, if waiver of Sec. 73.30 of the Rules were required in order to allow the maintenance of main studios at Newport News, Va. -- rather than in Norfolk or at the station's transmitter near Smithfield -- the same is hereby requested." Fischer, thus, did not attempt to rebut the presumption which flows from the fact that his proposal will provide a 5 mv/m signal over all of Norfolk.

13/ He has not, however, requested permission to so amend his application. The Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, supra, specifically provides that, "/I/f the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location." (Emphasis supplied.)

32. This proceeding has been in hearing status for more than seven years. After the Initial Decision was issued, it was stayed by the Commission en banc from August 3, 1961 (FCC 61-935) to March 4, 1965 (FCC 65-161). Thereafter, the proceeding was reopened and remanded for consideration of a then new policy of the Commission relating to common ownership and control of stations as it affected Station WESR at Tasley, Virginia, and the Tidewater proposal. Such new policy had been embodied in an amendment of Section 73.35 of the Rules on June 9, 1964 (FCC 64-545). Thereafter, a Supplemental Initial Decision was issued on April 19, 1965. The findings made in (1) the Initial Decision (FCC 61D-102) released July 11, 1961, and (2) the Supplemental Initial Decision (FCC 65D-16) released April 19, 1965, are hereby reaffirmed and incorporated by reference in this Second Supplemental Initial Decision.

Conclusions

1. It is undisputed that both of the applications involved in this proceeding must now be considered in the light of the new suburban application policy enunciated by the Commission on December 27, 1965, since both proposals would place a 5 mv/m signal over all of Norfolk. The population of the most populous community, Norfolk, is far more than twice that of Tidewater's principal community, Smithfield; and, likewise, the population of Norfolk is more than twice that of Fischer's principal community, Newport News. The Tidewater Broadcasting Company, Incorporated, specified Smithfield as its station location in its application and has remained steadfast in that station location specification. While Fischer specified Newport News as his station location in his application, he now represents that he is "satisfied" to have his application considered as one for Norfolk.

2. Three separate evidentiary hearings have been held on these applications.1/ Much of the evidence adduced at the first hearing,

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1/ The applications were designated for hearing by an Order released October 28, 1959; a full comparative hearing was held and an Initial Decision was released on July 11, 1961. Shortly after the issuance of such Initial Decision, the Commission en banc entered a stay thereof which remained in effect for more than three and one-half years. A change in the Commission's multiple ownership rules and policy required another hearing which was held and the Supplemental Initial Decision thereon was released on April 19, 1965. Still a third hearing was ordered after adoption of the new "suburban" application policy and after oral argument on exception to the first two Initial Decisions. That hearing, held pursuant to the second remand order, is the subject of this Second Supplemental Initial Decision.

held in the summer and fall of 1960, is pertinent to the issues under the new "suburban" application policy. Tidewater not only relies upon the earlier evidence, but also presented additional evidence directed specifically to the new issues set forth in the second remand order pursuant to which the instant hearing was held. Except for an engineering exhibit, Fischer adduced no evidence under the new issues.

3. As hereinbefore indicated, the Commission, in December, 1965, issued a policy statement establishing new criteria for Section 307(b) consideration of applications for standard broadcast facilities in suburban communities (6 RR 2d 1901), in which it was pointed out that over a period of years, the Commission had become increasingly concerned with applications for new standard broadcast stations in suburbs of larger cities. In the new policy statement, supra, the Commission specifically held that:

> "We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service. Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. For these reasons, it will be our policy in the future under Section 307(b) to examine every application for new or improved standard broadcast facilities to determine: (1) whether the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community. Where the test described above indicates penetration of each of two or more larger communities, the presumption will apply with respect to the largest of those communities. . . . (Emphasis supplied.)
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> "This new policy is intended to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a sub-standard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his

specified community. We are convinced that reliance upon the applicant's proposed coverage is a reasonable basis for initiating inquiry into that applicant's intent, since the propagation of a 5 mv/m daytime signal into a community of at least 50,000 persons and over twice as large as the applicant's specified community generally results in the propagation of a competitive signal over a heavily populated area of substantial size, and since service to such an area has often led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

"During the course of an evidentiary hearing to determine, inter alia, whether an applicant will realistically serve his specified community or another, larger community, that applicant will be required to rebut the presumption that will have arisen because of his proposed coverage. Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programming needs. The parties will then be permitted to show the extent to which that community's needs are being met by existing standard broadcast stations, and the applicant will be expected to show the extent to which his program proposal will meet the specific, unsatisfied programming needs of his specified community. At the same time, although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared with the sources from all other areas. (Emphasis supplied.)

"If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. The application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied." (Emphasis supplied.)

4. It thus seems clear that a primary concern of the Commission is that a station in a suburban community may subordinate its service to that community in order to serve the nearby larger city, thus failing to satisfy the needs of its designated community for service which has been shown or presumed to exist. The added issues and the proof required to meet them will be considered in that light.

5. The manner in which both applicants attempted to ascertain the separate and distinct programming needs of their respective communities is the subject of findings of fact set forth in paragraphs 45 and 52 of the Initial Decision herein. In this third hearing, Tidewater also adduced the testimony of 26 agricultural, civic, charitable and religious leaders of Smithfield who gave evidence concerning the need for local radio transmission service. It is concluded, as shown by the findings of fact in this and the prior Initial Decision in this proceeding, that both Tidewater and Fischer have established that each community has programming needs separate and distinct from the larger community of Norfolk.

6. Tidewater also offered evidence concerning the program service of the existing stations which provide a primary service signal to Smithfield and Isle of Wight County. Such evidence shows that while each of the existing stations seems aware of its responsibility to serve all of its service area, none devotes any significant time or effort to serving the particular needs of Smithfield and Isle of Wight County. The Smithfield area service from existing stations is limited, for the most part, to announcements of school closings due to weather conditions in the winter,[2/] coverage of major, as distinguished from local or regional, news stories, a few public service announcements, and an occasional coverage of a local event. It is concluded that Tidewater has affirmatively established that the needs of Smithfield and Isle of Wight County for a local transmission radio service are not being properly met by existing stations. Fischer offered no evidence on this phase of the case, and it must be concluded, therefore, that he has not met his burden of proof under the new Issue (a)(2).

7. The programming proposed by each applicant is directed chiefly to the main community which it or he originally proposed to serve. In this connection, it is noted that while Fischer designated Newport News in his application as the principal community and now represents that he is "satisfied" to be considered as a Norfolk applicant, he made no showing of any change in his proposed programming.

8. With respect to the sources of projected revenue, Tidewater estimated that 70% of its first-year revenues of $70,000 would be derived from local advertising, including 60% from business establishments in Isle of Wight County. It also estimated that an additional 5%

2/ These announcements require a request via long distance telephone from the local school superintendent to the Norfolk station which furnishes the service.

would come from retail businesses in Norfolk and Newport News, and that the remaining 25% would come from regional advertisers, i.e., ones selling their products throughout the area. These estimates were prepared by Dr. Baker upon the basis of his experience in operating stations in small communities, such as Tasley and Christiansburg, Virginia, his knowledge of the Smithfield area, studies of economic data, compilation of a list of potential business advertisers in Smithfield and nearby areas served by the local telephone exchange, and studies and interviews made in Smithfield and Isle of Wight County. The projected sources of advertising revenues from Smithfield and nearby areas (all situated on the west side of the James River), together with regional advertising, separate and distinct from that derived from metropolitan or urbanized areas, are sufficient to enable the proposed Tidewater station to operate as a small city and rural area station rather than as a large city station, and it is so concluded. Moreover, Tidewater has emphatically represented to the Commission that the proposed station will be so operated. Fischer offered no evidence under the new Issue (a)(4) which contemplates evidence as to revenue sources.

9. The evidence clearly supports the conclusion that Tidewater has sufficiently rebutted the presumption, flowing from the fact that its 5 mv/m contour encompasses Norfolk, and has realistically shown that its proposal will provide a local transmission service at its specified station location, Smithfield. On the other hand, Fischer made no attempt to rebut a similar presumption relative to his proposal and, in fact, stated that he is "satisfied" to have his application considered as one for Norfolk. The Commission has specifically pointed out that if such a presumption is not rebutted, it must be determined whether the proposal in question meets all the technical provisions of the Rules, including Sections 73.30, 73.31 and 73.188(b)(1) and (2).[3]

10. Section 73.188(b)(1) and (2) of the Rules provides that a transmitter site should be selected to provide (1) a minimum field intensity of 25 to 50 mv/m over the business or factory areas of the principal city, and (2) a minimum field intensity of 5 to 10 mv/m over the most distant residential section. Fischer's proposal would not satisfy the first of these requirements since only 47% of the main business district of Norfolk would fall within the proposed 25 mv/m contour. No showing was made as to the signal strength over

3/ If the technical requirements are met, then the application may be considered for Section 307(b) purposes as one for the most populous community. However, in the event an application is considered as one for the larger populous community, certain procedural requirements must also be met, including amendment to the application to show change in the specification of the principal community proposed to be served, location of studio, etc.

the factory areas of Norfolk. He has shown that a signal of at least 17 mv/m would be provided to all of the main business district, but offered no other evidence to support a waiver of the rule. It must, therefore, be concluded that Fischer's proposal would not comply with Section 73.188(b)(1), and sufficient showing has not been made to support a waiver of such sub-section of the Rules. The proposal would place a 5 mv/m signal over all of Norfolk and thus complies with the requirement of sub-section (b)(2) of Section 73.188 of the Rules.

11. Section 73.30(a) of the Rules requires that the main studio be located in the principal community or at the transmitter. Fischer's only showing in this respect establishes that his main studio would be located within Newport News at a site therein to be determined. No amendment to the application has been submitted showing change in the main studio location. Likewise, no showing has been made to support a waiver of the Rule, in the event Norfolk is assumed to be Fischer's principal community.

12. As shown by the findings of fact set forth in this and the two prior initial decisions in this proceeding, and the entire record of this proceeding, Tidewater has successfully rebutted the presumption that it is an applicant for a Norfolk station, under the new 307(b) suburban policy due to the fact that its proposal would place a 5 mv/m signal over Norfolk, and it continues to be an applicant for authorization for the first local station at Smithfield, Virginia. Fischer, on the other hand, has failed - in fact made no effort - to rebut the same presumption as to his proposal for Newport News and has categorically stated that he is now "satisfied" to have his application considered as one for a Norfolk station. Assuming that the Fischer proposal is considered as one for a Norfolk station, his proposal, as elsewhere discussed, is not in compliance with the requirements of Sections 73.30 and 73.188(b)(1) of the Rules and sufficient justification for the waiver of such requirements has not been shown.

13. Moreover, Section 307(b) of the Communications Act of 1934, as amended, requires that the Tidewater application be preferred over that of Fischer, whether considered to be one for Norfolk or one for Newport News. Norfolk has four local AM stations, seven FM stations, and three television stations (one for CP only) for local transmission service to its inhabitants;[4] and, in addition, the city receives primary reception service from several other stations.[5] The relationship between Smithfield and Norfolk is not that of one existing between the more populous center in the same urbanized area and its satellite communities, such as the Washington, D. C. Urbanized Area referred to

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4/ Records of the Commission officially noted.

5/ The service to Newport News is set forth in the Initial Decision.

by Fischer in his proposed findings and conclusions.6/ In the case of Smithfield, it is not a part of the Norfolk Urbanized Area or the Norfolk Standard Metropolitan Statistical Area. In fact, it is not a part of any such area. In consideration of Smithfield, it is significant that the U. S. Census Bureau in its report on the 1960 U. S. Census did not find the existence of common general social and economic characteristics or other criteria sufficient to include Smithfield in the Norfolk urbanized or metropolitan statistical areas. It is also of interest to note that while the highway distance between the two cities is about 19 miles, travel between them requires the payment in each direction of substantial bridge and tunnel toll fees because of water barriers, and that the two communities are in different telephone exchange areas.

14. The Broadcast Bureau places great emphasis on the power and frequency proposed by the applicants. To follow the theory set forth in the Bureau's proposed conclusions to its logical end would require denial of any proposal for a suburban station which would use more than minimal power and utilize other than a local frequency. Such interpretation of the policy statement is too restrictive.

15. The application of Fischer must be denied for the reasons set forth in the Initial Decision and for the further fact that he has not shown in the further hearings that his application should be preferred over the Tidewater application, whether his proposal be considered as one for Newport News or Norfolk.

16. The Commission has already waived the provisions of Section 73.35 of its Rules with respect to the Tidewater application and has specifically held that the overlap of the 1 mv/m contours of Station WESR, Tasley, Virginia, and that of the Tidewater proposal does not bar a grant of the latter (Memorandum Opinion and Order (FCC 66-61), released January 20, 1966).

17. The conclusions in the Initial Decision and the Supplemental Initial Decision are hereby reaffirmed and it is again concluded, based upon the findings and conclusions in all three of the Initial Decisions in this proceeding, that the public interest, convenience and necessity would be served by a grant of the application of The Tidewater Broadcasting Company, Incorporated, and the denial of the application of Edwin R. Fischer.

6/ The suburban communities of Silver Spring, Wheaton, Morningside, Bethesda, etc. cited by Fischer are in each instance a part of both the Washington, D. C. Urbanized Area and the Washington, D. C. Standard Metropolitan Statistical Area established by the Census Bureau in connection with the 1960 U. S. Census. The Census Bureau determined the extent of these areas on the basis of location, community of interests, accessibility, density of population, and the fact that the components of such areas are all situated in the same "integrated social and economic system".

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IT IS, ACCORDINGLY, ORDERED, This 13th day of January, 1967, that unless an appeal from this Second Supplemental Initial Decision is taken by one of the parties or the Commission reviews it on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of The Tidewater Broadcasting Company, Incorporated, for a construction permit for a new standard broadcast station to be operated on 940 kc with a power of 10 kw, daytime only, at Smithfield, Virginia, IS GRANTED, and that the application of Edwin R. Fischer for the same facilities to be operated at Newport News, Virginia, BE and the same is hereby DENIED.

Elizabeth C. Smith
Hearing Examiner
Federal Communications Commission

Released: January 17, 1967
and effective 50 days thereafter, subject to the provisions of the Rule cited in the ordering clause above. Exceptions, if any, must be filed within 30 days of the release date unless an extension is duly granted.

APPENDIX A

Interrogatories from Existing Stations

Specific responses to significant questions by stations placing a 2 mv/m signal over Smithfield were as follows:

Question III: "Please list the principal community or communities to which your station directs its service?"

The replies were as follows:

WRAP: "The principal communities to which WRAP directs its service are Norfolk, Portsmouth, Newport News, Hampton, Virginia Beach, Suffolk, Gloucester and Chesapeake, Virginia. In addition, the station serves numerous other communities which are smaller in size than the principal communities listed above."

WTAR: "WTAR Radio-TV Corporation principally serves Tidewater, Virginia area. Enclosed is a coverage map showing 42 counties in Virginia and North Carolina served by WTAR Radio-TV Corporation."

WGH: "Norfolk, Hampton, Newport News, Portsmouth, Virginia Beach, Chesapeake, York County."

WTID: "The principal communities served by WTID were identified in the application for assignment of license as Newport News and its sister city, Hampton. This continues to be the case."

Question IV(a): "If possible, please state the approximate percentage of your station's current local news programming which is devoted to local news of Smithfield and/or Isle of Wight County."

The replies were as follows:

WRAP: "It is believed that the percentage of the station's current local news programming which is devoted to local news of Smithfield and Isle of Wight County, Virginia, is about .075%."

WTAR: "It is impossible to answer this question since station WTAR does not keep records showing the amount of news devoted to each community it serves."

WGH: "Practically none."

WTID: "Station WTID does not broadcast local news directed to Smithfield or Isle of Wight County."

Question IV(b): "Describe the criteria employed by your station to determine if news items originating in Smithfield and/or Isle of Wight County should be included in your station's local news broadcasts."

The replies were as follows:

WRAP: "The significant news of Smithfield and Isle of Wight County is included in the station's local news broadcasts."

WTAR: "The criteria employed by station WTAR is whether or not such local news items are of significant importance to affect the business or social activities of Smithfield and/or Isle of Wight County."

WGH: "If considered of general, regional interest, our newsmen would contact appropriate officials."

Question IV(c): "Describe the sources from which your station obtain local news of Smithfield and/or Isle of Wight County."

The replies were as follows:

WRAP: "Local news of Smithfield and Isle of Wight County is obtained principally from the Associated Press newswire."

WTAR: "Station WTAR obtains its local news primarily from talking with the various civic leaders and business firms and law enforcement agencies in Smithfield and/or Isle of Wight County."

WGH: "As above--we maintain no stringers in that locality."

Question IV(d): "Does your station maintain local news gathering facilities in Smithfield or Isle of Wight County? If the answer is yes, please describe such facilities in detail, including the names of any persons employed there as news correspondents or stringers."

The replies were as follows:

WRAP: "No."

WTAR: "No, station WTAR does not maintain a local news gathering facility in Smithfield and/or Isle of Wight County."

WGH: "No."

Question V(a): "Please state whether it is your station's policy to broadcast public service announcements on behalf of groups and organizations in Smithfield and/or Isle of Wight County."

The replies were:

WRAP: "It is the station's policy to broadcast public service announcements in behalf of groups and organizations in Smithfield and Isle of Wight County."

WTAR: "Yes, station WTAR does make public service announcements on behalf of groups in Smithfield and/or Isle of Wight County."

WGH: "Yes, when requested."

WTID: Station WTID broadcasts public service announcements on a regular basis. However, because of the geographic lack of proximity between Smithfield-Isle of Wight County and WTID, no public service announcements on behalf of groups in Smithfield and Isle of Wight County have been broadcast since Big T Corporation acquired the ownership of the station."

Question V(b): "How many such announcements have been broadcast by your station in the seven days immediately preceding receipt of these interrogatories?"

The replies were:

WRAP: "In the seven days immediately preceding receipt of the interrogatories, about 15 public service announcements were broadcast by the station in behalf of Smithfield interests and about 20 in behalf of Isle of Wight County interests."

WTAR: "Station WTAR has not broadcast any such announcements in the seven days immediately preceding receipt of these interrogatories."

WGH: "None."

Question V(c): "Identify the Smithfield and/or Isle of Wight County organizations on whose behalf such announcements have been broadcast."

The replies were:

WRAP: "The organizations on whose behalf such announcements were broadcast by the station include Smithfield, Virginia Civic League; Senior Class, Georgie Tyler High School, Windsor; Grace Union Chapter #56 OES, Smithfield; 9-60 S & S Club, Smithfield; Carrsville Woodpeckers; Smithfield Porkers; Bailey Pontiacs, Chuckatuck; New Jerusalem Church of God in Christ, Carrsville; VC Temple Church of God in Christ, Rt. 32, Isle of Wight County; Little Zion Baptist Church, Smithfield; Christian Home Baptist Church, Windsor; Missionary Society, Christian Home Baptist Church, Windsor; and Mt. Tabor Church of God in Christ, Smithfield, Virginia."

WTAR: "Such public service announcements have been broadcast on behalf of the Rotary Club, Ruritan Club, as well as the various schools in these areas."

WGH: No response.

Question V(d): "How many public service announcements of all types were broadcast by your station in the seven days immediately preceding receipt of these interrogatories?"

The replies were:

WRAP: "Approximately 900 public service announcements of all types were broadcast by the station in the seven days immediately preceding receipt of the interrogatories."

WTAR: "No such announcements were broadcast the seven days immediately preceding receipt of these interrogatories."

WGH: "240."

Question VI: "Does your station presently broadcast any religious programs or services from or on behalf of churches or religious congregations in Smithfield and/or Isle of Wight County?

"If your answer is yes, please describe each such broadcast, giving the title of the program, the name of the religious organization on whose behalf it is broadcast, stating whether or not this program is regularly scheduled, its length and the day and time at which it is broadcast."

The replies were:

WRAP: "The station does not presently broadcast any religious programs or services from or on behalf of churches or religious congregations in Smithfield and Isle of Wight County."

WTAR: "No, station WTAR does not broadcast any religious programs or services from churches or religious congregations in Smithfield and/or Isle of Wight County. However, it does broadcast announcements concerning the various activities of religious groups in Smithfield and/or Isle of Wight County."

WGH: "No."

WTID: "No."

Question VII(a): "Does your station presently broadcast any programs of an educational nature from or on behalf of schools in Smithfield and/or Isle of Wight County?

"If your answer to the preceding question is yes, please describe such programs as were broadcast during the preceding week, giving the title of the program, the name of the organization on whose behalf it is broadcast, stating whether or not this program is regularly scheduled, its length and the day and time at which it is broadcast."

The replies were:

WRAP: "The station does not presently broadcast programs of an educational nature from or in behalf of schools in Smithfield and Isle of Wight County."

WTAR: "Yes. During the year Station WTAR does have some of the students in its studios participate in the 'Prep Roundup' program. This program is regularly scheduled each Thursday, 7:35-8:00 p.m., from September through May."

WGH: "Not specifically. WGH has a high school correspondent in the high school in Smithfield who reports ball scores and school activities. Also one finalist on this year's $500 Scholarship program was from Smithfield."

"WTID: "The answers to both parts of this interrogatory are 'no'."

Question VII(b): "Does your station broadcast information as to school closings and reopenings pertaining to the schools in Smithfield and/or Isle of Wight County during periods of inclement weather?

"If your answer is yes, please describe how such information is obtained."

The replies were:

WRAP: "The station does broadcast information as to school closings and reopenings with reference to schools in Smithfield and Isle of Wight County during periods of inclement weather. Such information is usually obtained by telephone."

WTAR: "Yes, station WTAR does broadcast information concerning school closings and reopenings for both Smithfield and Isle of Wight County. Station WTAR uses its own method, i.e., a secret number and code whereby the superintendent of schools acts as the sole representative of Smithfield and Isle of Wight County; he alone has the authority to tell us when schools will be opened or closed."

WGH: "Yes, on request...Superintendent."

Question VIII: "Does your station present any public affairs programs which, in the last six months, have presented any topics specifically related and local to Smithfield and/or Isle of Wight County?

"If your answer to the preceding question is yes, please list the dates on which such programs were presented, the format and topic of each, explaining how each program was specifically relevant to Smithfield and/or Isle of Wight County, and listing the individuals or groups from Smithfield and/or Isle of Wight County who actively participated in the preparation and presentation of these programs."

The four stations replied in the negative.

Question IX: "State whether your station has, in the past six months, broadcast any editorials specifically relating to affairs in Smithfield and/or Isle of Wight County.

"If your answer to the above is yes, please submit with your answer a copy of such editorial(s), showing the date or dates of broadcast."

Stations WRAP, WGH and WTID answered in the negative. WTAR replied: "Station WTAR does not broadcast editorials."

Question X: "State whether, during the last local election campaign, your station carried any political broadcasts by or on behalf of candidates for local office in Smithfield and/or Isle of Wight County.

"If your answer is yes, please list the names of the candidates, their political affiliation, the office which they sought and the date or dates on which they or their spokesman appeared on your station."

Stations WRAP, WTAR and WGH replied in the negative.

WTID: "While Big T Corporation did not own Station WTID at the time of the last election, Big T has no information to indicate that any such programs were broadcast; and believes that none were broadcast."

Question XI(a): "State whether your station has, in the last six months, broadcast any sporting events originating in Smithfield and/or Isle of Wight County, or involving teams from Smithfield and/or Isle of Wight County.

"If your answer is yes, please list the dates on which such programs were broadcast, the length and time of each broadcast, and the names of the teams or individuals involved."

Stations WRAP, WTAR and WGH answered in the negative.

WTID: "Again, while Big T Corporation did not own Station WTID during the past six month period, Big T has no information to indicate that any such programs were broadcast, and believes that none were broadcast. Smithfield-Isle of Wight sports news is not treated as local or regional news by WTID."

Question XI(b): "Is your station's policy to treat sports news involving Smithfield and/or Isle of Wight County as local or regional sports news?"

Stations WRAP and WTAR replied as local. WGH replied regional.

Question XII: "Does your station currently present any local originations from Smithfield and/or Isle of Wight County?

"If the answer to this question is yes, please give the time and frequency of the broadcast of these programs, explain briefly their format and list any groups and/or individuals who actively participated in the production and presentation of these programs."

The replies were as follows:

WRAP: "The station does not currently present any local originations from Smithfield or Isle of Wight County."

WTAR: "No, station WTAR does not currently present any local originations from Smithfield and/or Isle of Wight County. However, on special occasions such as the grand opening of the Smithfield Packing Company Plant, WTAR did originate two whole days of broadcasting from Smithfield."

WGH: "No, except spot news coverage."

WTID: "No."

Question XIII: "Does your station presently broadcast information concerning local weather and driving conditions and local working conditions in Smithfield and/or Isle of Wight County?

"If your answer is yes, please describe in some detail the information broadcast, the source of the information, and the frequency or times of broadcast."

The replies were:

WRAP: "The station does presently broadcast information concerning local weather and driving conditions in Smithfield and Isle of Wight County on the occasion of unusual or severe weather conditions. This information is obtained from local officials and the state highway patrol. It is presented in the form of weather bulletins and it is not known with what frequency these broadcasts have taken place."

WTAR: "Yes, Station WTAR does broadcast information concerning driving conditions in Smithfield and/or Isle of Wight County during inclement weather. This is done frequently when necessary, and such information is obtained from the Sheriff's office and the State Highway Patrol."

WGH: "Not separately from other Tidewater news."

WTID: "No."

Question XIV: "Does your station regularly solicit local advertising business in Smithfield and/or Isle of Wight County?

WCMS, WVEC, WGH and WTID replied in the negative, and WRAP replied "not regularly". WTAR, WAVY and WBCI declined to answer on the ground of privilege.

The replies of the other stations to the written interrogatories were generally similar to those of WRAP, WTAR, WGH and WTID. Each indicated an awareness of its responsibility to serve its service area. None showed any regularly scheduled special programming for Smithfield or Isle of Wight County.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 68-405
14274

In re Applications of	)	
	)	
THE TIDEWATER BROADCASTING COMPANY, INCORPORATED	)	DOCKET NO. 13243
Smithfield, Virginia	)	File No. BP-12814
	)	
EDWIN R. FISCHER	)	DOCKET NO. 13248
Newport News, Virginia	)	File No. BP-13114
	)	
For Construction Permits	)	

Appearances

Robert M. Booth, Jr., on behalf of The Tidewater Broadcasting Company, Incorporated; William B. Bernton and E. Theodore Mallyck on behalf of Edwin R. Fischer; Larry M. Berkow, Ernest Nash, and Leo I. George on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted April 12, 1968 ; Released April 16, 1968

By the Commission: Commissioners Bartley, Loevinger and Wadsworth concurring in the result; Commissioner Cox not participating.)

1. The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer are mutually exclusive applicants for construction permits to build and operate new standard broadcast stations in Smithfield and Newport News, Virginia, respectively. 1/ In our Order designating these applications for hearing, 2/ we found that each of the applicants is legally, technically and financially qualified, and we specified an issue to determine

1/ Both The Tidewater Broadcasting Company, Incorporated, hereinafter referred to as Tidewater, and Edwin R. Fischer, hereinafter referred to as Fischer, propose to operate new Class II stations on 940 kilohertz with 10,000 watts of power, daytime only, while utilizing a nondirectional antenna.

2/ FCC 59-1079, released October 28, 1959.

which of the applications would better provide a fair, efficient, and equitable distribution of radio service under Section 307(b) of the Communications Act. 3/ However, after completion of the specified hearing, 4/ we adopted our new Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities involving Suburban Communities, 5/ in which we concluded that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified station location.

2. We also stated that the 307(b) Policy Statement would be applied to all pending proposals, as well as to those filed in the future, since it would materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas. 6/ Thus, in pursuance of the 307(b) Policy Statement, we concluded that this proceeding must be remanded for a further hearing because each

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3/ In addition, this proceeding originally involved issues concerning the areas and populations to be served; interference caused and received; and a contingent standard comparative issue, which was to be considered if the 307(b) issue was not determinative. In the present posture of this proceeding, no question of interference remains to be resolved.

4/ Although Hearing Examiner Elizabeth C. Smith released an Initial Decision, 2 FCC 2d 368, on July 11, 1961, proposing to grant Tidewater's application, we were subsequently requested by Tidewater to reopen the record and to enlarge the issues in this proceeding to determine whether grant of the Tidewater proposal would contravene the provisions of Section 73.35(a) of our Rules with respect to the multiple ownership of standard broadcast stations. Due to the overlapping coverage areas arising from the proposed increase in power of commonly owned Station WESR, Tasley, Virginia, we concluded that a further hearing should be held to determine whether Tidewater's proposal complies with Section 73.35(a) or whether circumstances exist which would justify waiver of the Rule, FCC 64-355, released, as corrected, on April 30, 1964. Thereafter, Examiner Smith released her Supplemental Initial Decision, 2 FCC 2d 408, on April 19, 1965, in which she held, inter alia, that waiver of the Rule was warranted and that Tidewater's application should be granted. After hearing oral argument, en banc, on December 9, 1965, we adopted the findings and conclusions of the Examiner's Supplemental Initial Decision, holding that waiver of the Rule was warranted, 2 FCC 2d 364, 6 RR 2d 730 (1966). Thus, we do not need to give the overlap issue any further consideration at this stage of the proceeding.

5/ 2 FCC 2d 190, 6 RR 2d 1901 (1965).

6/ Ibid., paragraph 12.

of the applicants proposes 5 mv/m daytime service within the geographic boundaries of at least one other community, Norfolk, with more than 50,000 persons and with a population at least twice as large as that of the applicant's specified station location. 7/ In order to determine whether each of these proposals will realistically serve its own specified station location or some other larger community, we also revised the issues in this proceeding so that, in addition to the usual 307(b) evidence concerning the independence of a suburban community from its central city, the parties would fully explore all matters relating to the need for each of these proposals. 8/

3. By her Second Supplemental Initial Decision, 9/ Examiner Smith proposed to grant Tidewater's application and to deny Fischer's application. The Examiner concluded that Fischer, who did not offer any evidence to rebut the presumption that his proposal was for Norfolk, should be denied in view of his failure to comply with the technical provisions of our Rules for stations assigned to that community. On the other hand, the Examiner held that the showing made by Tidewater was sufficient to rebut the presumption that its proposal is for Norfolk and to establish that its proposal is realistically for the community of Smithfield. While we agree with the Examiner's conclusion that Fischer's application must be denied, we are convinced after consideration of the entire record in this proceeding that Tidewater's application should also be denied. 10/

7/ 2 FCC 2d 364, 6 RR 2d 730 (1966).

8/ We noted that each of the applicants would be expected to show the extent to which it has ascertained that its specified station location has separate and distinct programming needs, the extent to which these needs are not being met by existing standard broadcast stations, and the extent to which its program proposals will meet these needs. Additionally, we stated that each of the applicants would be expected to adduce evidence as to whether the projected sources of advertising revenues from within its specified station location are adequate to support its proposal as compared with its projected sources from all other areas.

9/ FCC 67D-1, released January 17, 1967.

10/ Before us for consideration are: (a) exceptions and supporting brief, which were filed on March 3, 1967, by Fischer; (b) exceptions and supporting brief, which were filed March 3 and 6, 1967, respectively, by the Chief, Broadcast Bureau; and (c) a reply to those exceptions and a supplement to its reply, both of which were filed on March 20, 1967, by Tidewater. We heard oral argument, en banc, on December 11, 1967, and, except as modified herein and by our rulings on exceptions which are attached as an Appendix, we adopt the findings of fact set forth by the Examiner in her Initial Decision and in her Second Supplemental Initial Decision. In view of our determination that both applications should be denied, however, our conclusions will be substituted for those of the Examiner in her Initial Decision and in her Second Supplemental Initial Decision.

4. Fischer's application originally proposed a new standard broadcast station for the 113,662 residents of Newport News, Virginia. 11/ Newport News is part of the Newport News-Hampton, Virginia, Urbanized Area (population 208,874) and is separated from Norfolk, Virginia (population 304,869), and the Norfolk-Portsmouth, Virginia, Urbanized Area (population 506,822) only by Hampton Roads where the James River flows into the Chesapeake Bay. In addition to serving Newport News, Fischer's proposal would provide 5 mv/m service to all of Norfolk, and, as indicated above, Fischer has now stated that he is satisfied to have his application treated as a proposal for a Norfolk station. However, Fischer's proposal would not comply with the requirement of Section 73.188(b)(1) of our Rules for stations assigned to Norfolk, 12/ since Fischer would provide 25 mv/m service only to 98% of Norfolk's main industrial area and to 47% of its main business district.

5. Fischer urges that his proposal would provide approximately 23.4 mv/m service for all of the main industrial area and for 63% of the main business district and that it would provide at least 17 mv/m service for all of Norfolk's main business district. Since virtually all of the industrial area, where the existence of man-made noise makes a high intensity signal most important, would receive the requisite service, Fischer contends that his proposal substantially complies with the requirement of Section 73.188(b)(1). Citing WGUN, Inc., 13/ Fischer concludes that his application can and should be granted on the condition that it be amended to specify Norfolk as his station location.

11/ The population figures in this paragraph are taken from the 1960 U. S. Census.

12/ Section 73.188(b)(1) provides that the site selected for location of a transmitter should meet the following conditions: "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

13/ 38 FCC 529, 4 RR 2d 853 (1965). In that proceeding, which was concluded prior to the adoption of the 307(b) Policy Statement, the applicant was permitted to change its station location from Decatur to Atlanta, Georgia, in spite of its failure to comply fully with Section 73.188(b)(1). We held that waiver of the rule was appropriate, since, inter alia, the applicant's failure to provide 25 mv/m coverage throughout the broadcast day occurs only because it must reduce power during critical hours to protect a Canadian station on the same frequency.

6. In determining whether Fischer's application should be granted as a Norfolk station, it is important to consider all aspects of his proposal throughout this entire proceeding. As noted above, Fischer originally specified Newport News as his station location and he urged during the initial hearing that his application was entitled to a 307(b) preference for that community. While Fischer recognized his obligation to serve his entire proposed listening area, it is abundantly clear that the principal emphasis of his program proposal was placed upon the needs of his listeners outside of the Norfolk-Portsmouth Urbanized Area. Indeed, in a letter dated January 3, 1966, and written shortly after the adoption of the 307(b) Policy Statement, it was urged that Newport News has a need for an additional standard broadcast station, that Newport News has separate and distinct programming needs, and that the primary thrust of Fischer's program proposal was to meet the needs of the Newport News-Hampton Urbanized Area. Nonetheless, during the most recent hearing, without seeking to amend his program proposal or offering any explanation of his prior statements, Fischer has stated that he is now satisfied to be treated as an applicant for a Norfolk station.

7. It is also significant that, while seven standard broadcast stations now operate in the Norfolk-Portsmouth Urbanized Area, only two standard broadcast stations are now assigned to Newport News and only three standard broadcast stations are now operating in the entire Newport News-Hampton Urbanized Area. In addition to those ten stations, four other standard broadcast stations are now operating in the nearby communities of Chesapeake, Suffolk, Virginia Beach, and Williamsburg, Virginia, and applications for still another facility in this area were recently designated for hearing. 14/ Although Fischer previously asserted that his application should be granted since Newport News has fewer stations than other smaller communities within the State of Virginia, he is now willing to increase the number of stations assigned to Norfolk at the expense of Newport News in order to obtain a grant of his application. 15/

14/ 9 FCC 2d 205 (1967). Docket Numbers 17605 and 17606, involving applications for Williamsburg and Suffolk, Virginia.

15/ In this connection, it should be noted that Section 1.525(b) of the Rules was amended to preclude the resolution of such conflicting 307(b) claims on the basis of the applicants' private interests without permitting other interested parties to apply for the facility which otherwise would be abandoned. See FCC 61-1021, released August 4, 1961, 20 RR 1673.

8. We recognize that in the past Section 73.188(b)(1) has been waived and that grants have been made without absolute compliance with all of the provisions of that rule. 16/ However, in view of all of the circumstances in this proceeding, we are not persuaded that Fischer's application for a new facility warrants grant as a Norfolk station. In paragraph 9 of the 307(b) Policy Statement we pointed out that we "wish to discourage any proposal that will be merely a substandard central city station," and in paragraph 11 we clearly stated that an applicant, who fails to rebut the 307(b) Policy Statement presumption, as Fischer has failed to do, and who fails to meet all of the requirements for that central city, will be denied. As noted above, there are ample stations in Norfolk and throughout the metropolitan area, and Fischer has failed to provide any explanation for the inconsistency between his present willingness to adopt Norfolk as his community and his prior avowals concerning Newport News. For all of these reasons, it is clear that Fischer has not made a sufficient showing to justify either a waiver of Section 73.188(b)(1) or a finding of substantial compliance with that rule. Since the 307(b) Policy Statement was specifically adopted to assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas, we are convinced that it would be wholly inappropriate under the circumstances of this proceeding to permit Fischer to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b).

9. Tidewater, on the other hand, has attempted to show that its proposal will realistically provide a local transmission facility for Smithfield. The community of Smithfield had a population in 1960 of 917 persons, but its population has been increased since then to approximately 3,000 persons by virtue of Smithfield's annexation of the surrounding area. Smithfield is the largest community in Isle of Wight County, which has a total population of 17,164 persons. However, Tidewater's proposal would provide 2 mv/m service to an urban population in excess of 736,000 persons including all of the Newport News-Hampton and the Norfolk-Portsmouth Urbanized Areas and the cities of Suffolk and Virginia Beach. Thus, Tidewater's 5 mv/m service to Norfolk is, in the context of the 307(b) Policy Statement, merely one indication of the competitive signal which the Tidewater proposal would provide throughout the entire metropolitan area. At the same time, Tidewater would provide 0.5 mv/m or greater service to an additional population of at least 234,682 persons residing in other areas of Virginia and North Carolina.

10. In support of its proposal, Tidewater presented the written testimony of some 26 civic leaders and other persons, who

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16/ See, for example, KDEF Broadcasting Co., 30 FCC 635, 20 RR 684 (1961).

either live or work in Smithfield, to establish that Smithfield has separate and distinct needs for a local transmission service. Although each of those persons indicated ways in which a local radio station could be used for the benefit of Smithfield, many of them also stated that they had never requested the assistance of or used the facilities of existing stations in the area. Nonetheless, written interrogatories answered by several of the stations in the area around Smithfield demonstrate that the needs of that community had not been completely ignored. Station WGH, Newport News, states that it reports the scores of Smithfield athletic events and other school activities, broadcasts public service announcements on behalf of Smithfield organizations when requested, and announces school openings and closings upon request of the Smithfield Superintendent of schools. Station WRAP, Norfolk, states that it broadcasts information concerning weather and driving conditions in Smithfield and Isle of Wight County during severe weather conditions and that it carries public service announcements for groups and organizations from both Smithfield and Isle of Wight County. Station WTAR, Norfolk, also carries announcements concerning Smithfield public service organizations, school closings, and driving conditions and states that it will broadcast directly from Smithfield on special occasions. Finally, each of the three stations asserts that significant Smithfield news is reported on its local newscasts.

11. Although Tidewater's program proposal is directed chiefly toward the needs of Smithfield and Isle of Wight County and the surrounding rural areas, the applicant recognizes its obligation to serve its entire listening area. Thus, in addition to the entertainment, news, and other programs which are designed for Smithfield and the surrounding rural area, a number of Tidewater's proposed programs would also be of interest to listeners throughout the urban areas, where more than 70% of Tidewater's potential audience resides. Tidewater's estimate concerning potential revenues was based primarily upon the knowledge and experience of its president, Vernon H. Baker. No attempt was made to contact advertisers in Smithfield or in the surrounding rural areas to determine whether they presently advertise or whether they would be interested in purchasing advertising over a local radio station. Nonetheless, in spite of the fact that Isle of Wight County had annual retail sales of only $12,025,000 during 1962, Baker estimated that approximately $49,000 in advertising revenues would be obtained from businesses in Smithfield and the surrounding rural area during the station's first year of operation and that approximately $21,000 would come from businesses selling their products throughout the metropolitan area.

12. Tidewater urges that these facts are sufficient to rebut the presumption that it realistically proposes to serve Norfolk rather than Smithfield and that this evidence justifies a grant of its application. In addition, Tidewater contends that its proposed 10,000 watts of power are necessary to serve the rural areas around Smithfield and that its proposal is consistent with the 307(b) Policy Statement, which indicates that a developing and deserving suburban community should be afforded an opportunity to obtain a first local transmission service. Tidewater then asserts that Smithfield is not within the Norfolk-Newport News metropolitan area and that its proposed 5 mv/m contour falls over Norfolk only because of the high conductivity of the salt water path which lies between Smithfield and Norfolk. Finally, Tidewater claims that similar applications have been granted without hearing on a lesser showing than the one it has made in this proceeding.

13. While we stated in the 307(b) Policy Statement, and while we still believe, that smaller communities should be afforded an opportunity to obtain a local radio station, such determination cannot be divorced from our further conclusion that, as power and coverage are increased to serve larger numbers of persons in metropolitan areas, stations often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. Thus, we also stated in the 307(b) Policy Statement that substandard central city stations should be discouraged and that such applicants should only propose as much power as they need to comply with our allocation rules. In this respect, Tidewater has not shown what effect use of lower power, directionalized operation, or a different transmitter site would have upon its proposal. Nor can Tidewater's contention that Smithfield is not located within the metropolitan area be given substantial weight in view of the evidence in this proceeding which establishes that Tidewater's 10,000 watt proposal would place an extremely competitive signal, not only in Norfolk, but all over the entire metropolitan area. Although Tidewater is correct that conductivity over salt water will result in the extension of its signal in the metropolitan area, the evidence clearly establishes that, even if its 5 mv/m contour were projected only over land, the 10,000 watts of power which Tidewater proposes would still cause its 5 mv/m contour to penetrate the boundaries of Norfolk. The facts in this proceeding amply disclose the reasons why the 307(b) Policy Statement was based upon proposed coverage rather than upon the applicant's specified station location.

14. The further hearing pursuant to the 307(b) Policy Statement was held to permit Tidewater to present evidence demonstrating that it will provide a realistic local transmission service for Smithfield. It is clear, however, that the amount of evidence required to establish than an applicant will provide a realistic local transmission service depends in large measure upon the objective facts concerning that proposal. 17/ Therefore, applications which may have been granted in other proceedings must be considered within the context of their particular facts. In KEZY Radio, Inc., 18/ an existing station requested permission to increase its power during daylight hours from 1000 watts to 5000 watts to improve its service for Anaheim, California, its specified community, and Orange County. Although the applicant's coverage of Los Angeles was also increased, its specified community had a population of approximately 104,000 persons and was one of the central cities of a standard metropolitan statistical area entirely separate from Los Angeles. Noting that there was only one other station in Orange County which had a population in excess of 1,000,000 persons, that the needs of Orange County organizations were not being met, and that national and regional advertising was sold on the basis of its audience in Anaheim and Orange County, we held that the applicant's entire factual showing was sufficient to establish that it would not become a Los Angeles station.

15. In Clay Broadcasting, Inc., 19/ the applicant proposed operation with only 500 watts for a community of nearly 9,000 persons. Although 5 mv/m service would be provided to the much larger city of Kansas City, Missouri, we found that the applicant proposed a relatively low power and omnidirectional radiation pattern, that its antenna was located to provide maximum service to its specified community and the surrounding county rather than to Kansas City, and that there was a need for a first local broadcast outlet for that suburban area. In view of all of the material presented by the applicant, we concluded that it had demonstrated that it would not become realistically a

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17/ See the Memorandum Opinion and Order denying reconsideration of the 307(b) Policy Statement, 2 FCC 2d 866, 6 RR 2d 1908 (1966); and Monroeville Broadcasting Company, FCC 68-404, released this same date.

18/ 3 FCC 2d 407, 7 RR 2d 294 (1966).

19/ 4 FCC 2d 932, 8 RR 2d 687 (1966).

Kansas City station. 20/ In view of the facts in each of those proceedings, we are convinced that they are clearly distinguishable and are not precedents for our determination of this proceeding. 21/ While those applicants proposed power commensurate with the size of their specified communities and the surrounding areas and with the requirements of our rules, Tidewater proposes the relatively high power of 10,000 watts for a community of approximately 3,000 persons in a county with a total population of 17,164 persons. 22/

16. Although the community of Smithfield and Isle of Wight County are clearly independent of the overall metropolitan area because of the geographical characteristics of the area, it has been amply shown that Tidewater's 10,000 watt proposal would provide a new competitive service for approximately 736,000 persons throughout that metropolitan

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20/ In WTOW, Inc., FCC 68-9, released January 10, 1968, which was decided after the oral argument in this proceeding, the applicant was permitted to change its directional antenna radiation pattern. Although the applicant's 5 mv/m coverage of Baltimore was thereby increased, we noted that the change did not involve either an increase in power or a move of the transmitter site closer to Baltimore; that the change was necessary to bring the applicant's present operation into compliance with the requirements of Section 73.188(b)(1) of the Rules for its specified community, Towson, which had a population of 19,090; and that the change was required to provide service for the portions of the surrounding Baltimore County (population 492,428) which had not previously received service from the county's only standard broadcast station. In light of the applicant's showing, we concluded that it had established that it would not become merely another Baltimore city station.

21/ WFLI, Inc., 3 FCC 2d 123 (1966), which was also cited by Tidewater, became effective pursuant to Section 1.276 of the Rules. However, our Public Notice, FCC 61-25, released January 6, 1961, 20 RR 1141, stated that an Initial Decision that automatically becomes final does not establish a binding precedent for future cases.

22/ In spite of its high power, Tidewater's proposal would not even provide service for all of the five county area which it claims its proposal was designed to serve. Nonetheless, even assuming that its proposal would cover all of that five county area, the potential audience in that area would be less than 95,000 persons and less than ten percent of its total potential audience as an area wide station.

area. Indeed, the 10,000 watts which Tidewater proposes would make it more powerful during daytime hours than any standard broadcast station presently assigned to that metropolitan area. In spite of the broad invitation to Tidewater in our remand Order to show that it will provide a realistic local transmission service for Smithfield, we are not persuaded that the record in this proceeding is sufficient to establish that Tidewater's proposal would not become merely another Norfolk station in view of its 10,000 watts of power and its substantial coverage of the entire metropolitan area.

17. We recognize that Smithfield has separate and distinct programming needs, 23/ but the record also demonstrates that, although present service could undoubtedly be improved, the needs of the relatively small population of Smithfield are not being ignored by the existing stations. This fact must also be considered in light of the meager showing which Tidewater has made with respect to potential revenues for its proposed station. Since Tidewater's proposal, serving virtually all of the metropolitan area with at least some programming of general interest on the highest powered station in the area, would be extremely attractive to regional and national advertisers, we can give very little weight to Tidewater's unsupported assertion that Smithfield and Isle of Wight County businesses would provide adequate revenues to support its station. In view of the propensity of licensees with such power and coverage to identify themselves with the entire metropolitan area and to serve the needs of that overall area at the expense of the transmission needs of their specified communities, 24/ we are convinced that Tidewater's proposal must be treated as an application for a Norfolk station. This is not meant to suggest that Tidewater's proposal will inevitably become merely another Norfolk station, but simply to indicate that Tidewater has failed to make a sufficient showing to

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23/ The facts that Smithfield is located in a predominatly agricultural area and is physically separated from the metropolitan area makes our present determination under the 307(b) Policy Statement unusually important, since a metropolitan area reception service would not likely remain responsive to those specialized needs.

24/ While a station should certainly meet the transmission needs of its specified community, we do not wish to infer that such a station is not also expected to provide reception service for its entire listening area. See Petersburg Television Corp., 19 FCC 451, 10 RR 567 (1954).

establish that it will not eventually become such a station in view of its high power, its broad coverage of the metropolitan area, and its failure to demonstrate that revenues adequate to support the station are available in Smithfield and Isle of Wight County. 25/

18. Since Tidewater has failed to establish that its proposal would not become a Norfolk station, it will be required to meet all of the technical provisions of our rules for stations assigned to that city. However, the record clearly establishes, and Tidewater does not dispute, that its proposal would not place a 25 mv/m signal over Norfolk's business and factory areas as required by Section 73.188(b)(1) of the Rules. While Tidewater has not requested a waiver of that provision of the Rules, we are convinced that, just as we held with respect to Fischer's application, it would be wholly inappropriate under the circumstances of this proceeding to permit Tidewater to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b). For all of the reasons set forth above, we conclude that the fair, efficient, and equitable distribution of radio service and the public interest, convenience and necessity would be best served by denial of both Fischer's and Tidewater's applications.

19. Although we have concluded that the applicants' present proposals must be denied, we are persuaded that the public interest would also be served by permitting the applicants to file new applications as soon as possible if they should wish to do so. While this proceeding was originally designated for hearing in 1959, it has been necessary to hold two further hearings because of modifications in our rules and policies and it has been necessary for Examiner Smith to prepare three separate Initial Decisions. Despite the applicants' failure to demonstrate that their present proposals are realistic, there are indications in this record that realistic proposals would fulfill specific programming needs for communities in this area.

20. Thus, we are persuaded that Section 1.519 of the Rules, prohibiting repetitious applications, should be waived to permit both applicants to file new applications, which will demonstrate that they are realistically designed to serve the needs of their specified communities. Those new applications may specify the same or a different community, so long as they comply with all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that community. The applicants may specify different transmitter sites and they may reduce their power. However,

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25/ Even if Tidewater had shown that it could obtain sufficient revenues in Smithfield and Isle of Wight County to support its station, we are convinced that Tidewater's proposed power and coverage would still require its proposal to be treated as a Norfolk station under the facts and circumstances of this proceeding.

in no instance will either applicant be permitted to file a new application which would cause or receive interference in areas significantly differing from those areas in which interference would result from a grant of one of the applications which are being denied in this proceeding. 26/ At the same time, we shall permit any other interested parties to file applications, conforming to the requirements set forth in this paragraph, so that the most suitable proposal for this area may be selected.

21. ACCORDINGLY, IT IS ORDERED:

(a) That the application of The Tidewater Broadcasting Company, Incorporated (File No. BP-12814), for a construction permit for a new standard broadcast station to operate in Smithfield, Virginia, IS DENIED;

(b) That the application of Edwin R. Fischer (File No. BP-13114) for a construction permit for a new standard broadcast station to operate in Newport News, Virginia, IS DENIED; and

(c) That Section 1.519 of the Rules IS WAIVED to permit The Tidewater Broadcasting Company, Incorporated, and Edwin R. Fischer to file new applications in conformity with paragraph 20 of this Decision.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Attachment

26/ In view of the history of this proceeding, the need which exists for realistic proposals, and the apparent difficulty which either applicant would have meeting our present allocation rules, we shall also waive any provision of our present rules, including Section 73.35(a), which would preclude the filing of applications in conformity with this paragraph.

APPENDIX

Rulings on Exceptions to the Initial Decision

Exceptions of Edwin R. Fischer

Exception No.	Ruling
1-2	Denied. The Examiner's findings adequately and correctly reflect the record.
3-23, 25-36	Denied for lack of decisional significance in view of our Decision herein.
24	Granted to the extent reflected in paragraph 6 of our Decision herein.
37-56	Granted to the extent that the Examiner's conclusions have been deleted, but otherwise denied for lack of decisional significance in view of our Decision herein.

Exceptions of the Chief, Broadcast Bureau

1-3	Granted to the extent that the Examiner's conclusions have been deleted, but otherwise denied for lack of decisional significance in view of our Decision herein.

Rulings on the Exceptions to the Supplemental Initial Decision

The rulings previously made and set forth in our Memorandum Opinion and Order at 2 FCC 2d 364, 6 RR 2d 730 (1966), are hereby reaffirmed.

Rulings on Exceptions to the Second Supplemental Initial Decision

Exceptions of Edwin R. Fischer

1	Granted to the extent that the Examiner's conclusions have been deleted, but denied in all other respects. See paragraph 17 of our Decision herein.

Exception No.	Ruling
2	Granted to the extent reflected in paragraphs 10 and 17 of our Decision herein.
3, 6	Granted for the reasons set forth in our Decision herein.
4	Granted to the extent reflected in paragraphs 4 and 5 of our Decision herein.
5, 7	Denied for the reasons set forth in our Decision herein.
8-9	Granted to the extent that the Examiner's conclusions have been deleted, but denied in all other respects for lack of decisional significance in view of our Decision herein.
10	Granted to the extent that Tidewater's application is denied in our Decision herein, but denied in all other respects for the reasons set forth in our Decision herein.
Exceptions of the Chief, Broadcast Bureau	
1	Granted to the extent that the Examiner's erroneous statement is deleted, but denied in all other respects since the Examiner's remaining findings adequately reflect the record.
2	Denied. The Examiner's finding adequately reflects the record.
3-5	Granted to the extent reflected in paragraphs 11 and 17 of our Decision herein, but denied in all other respects for lack of decisional significance in view of our Decision herein.
6,8-9,12-13	Granted for the reasons set forth in our Decision herein.
7	Granted to the extent reflected in paragraphs 4 and 5 of our Decision herein.
10-11	Granted. The Examiner's conclusions have been deleted.

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APPELLANT'S BRIEF

In The United States Court Of Appeals
For The District Of Columbia Circuit

Case No. 21,942

EDWIN R. FISCHER,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

THE TIDEWATER BROADCASTING COMPANY, INC.,

Intervenor.

Appeal From Memorandum Opinion And Order And
From Decision Of Federal Communications Commission

William P. Bernton
621 Colorado Building
Washington, D. C.
Counsel for Appellant,
Edwin R. Fischer

October 2, 1968

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

The parties to this appeal, by counsel, have stipulated and agreed, and it has so been approved by the Court, that the following issues are presented by this appeal:*

I.

Whether the Commission's application of its "Policy Statement on Section 307(b) Considerations" to deny a grant of Appellant's application was erroneous because:

(a) The Policy Statement represented a substantive rule-making that was invalid because of failure to comply with Section 4 of the Administrative Procedure Act (5 U.S.C. 553), or

(b) Its application in this instance violated the mandate of this Court in Miners Broadcasting Service, Inc. v. Federal Communications Commission, or

(c) Its application in this instance was arbitrary and capricious.

II.

Whether the Commission erred in denying Appellant's application under its "Policy Statement on Section 307(b) Considerations".

*Neither Appellee nor Intervenor admits to any factual or legal premise inherent in these questions.

III.

Whether the Commission erred in refusing to consider, at the time it was submitted, the merits of Appellant's letter of January 3, 1966 which demonstrated the needs of the community of Newport News for additional radio origination service and, thereafter, invoking the facts set out in said letter as a reason for refusing to waive Sec. 73.188 of its Rules (or to find substantial compliance therewith) so as to permit a grant of Appellant's application as an application for a Norfolk station.

IV.

Whether, in the circumstances of this case, the Commission erred in ignoring the "overriding decisional significance" of the overlap between the 1 mv/m contour of the Tidewater proposal and that of commonly-controlled WESR, in waiving the "fixed overlap rules" expressed in Sec. 73.35(a) of its Rules.

V.

Whether the Commission violated Appellant's rights under its "cut-off" Rules (Sec. 1.227), denied Appellant administrative due process or otherwise erred where, after denying the applications of Appellant and another mutually exclusive

applicant, the Commission invited the applicants to re-file applications containing engineering proposals similar to those of the dismissed applications and, also, opened up the proceeding so that new applicants would also be allowed to file competing applications that would otherwise have been barred by Section 3.37 of its Rules.

* * *

This case was not previously before this Court.

STATEMENT OF THE CASE

On May 15, 1959, Appellant filed with the Federal Communications Commission (hereinafter "Commission") an application for a construction permit for a new standard broadcast radio station to be licensed at Newport News, Virginia, and to operate, daytime only, on the frequency 940 kHz with a power of 1,000 watts. His application was one of a number of applications for new or modified facilities that specified the same frequency and were designated together for a consolidated hearing. As a result of amendments, dismissals and grants without hearing, these applications were severed into a number of separate proceedings; and it finally transpired that the only other application with which Appellant's application was in conflict was that of the Intervenor herein (hereinafter referred to as "Tidewater") which proposed facilities identical with those of Appellant, to be located at a transmitter site only about a mile away from Appellant's designated site, but which proposed, as the city of license, the community of Smithfield, Virginia. Accordingly, a separate hearing was held with respect to those two applications to determine which, if either, should be granted.

The tenor of the original issues in the hearing proceeding, so far as are pertinent to this appeal, were:

1. To determine whether the assignment of the frequency to Newport News or to

Smithfield would best provide a fair, efficient and equitable distribution of service under Sec. 307(b) of the Communications Act of 1934, as amended, (47 U.S.C. 307(b)).

2. To determine whether one or both applicants would serve the community selected under the first issue as having the greater need for new facilities; and

3. In the event both applicants were found to serve such community, to determine, under the "standard comparative issue", which of the two applicants would better serve the public interest.

On July 11, 1961, the Hearing Examiner released an Initial Decision in which she determined that the mandate of Section 307(b) of the Communications Act would be better served by a grant to the community of Smithfield than to the city of Newport News. Since Fischer's proposal would have provided the same reception service to Smithfield as that of Tidewater, the Examiner compared the two applicants under the "standard comparative" issue and concluded that Tidewater was the better qualified applicant.

Appellant promptly filed Exceptions to this Initial Decision and awaited action of the Commission thereon. Thereafter, for reasons not germane to this appeal, the proceeding was stayed for almost three years. During this period, the Commission initiated a rule-making proceeding (Docket No. 14711) looking towards the amendment of its multiple ownership rules (73 CFR 35) to prohibit the overlap of the one millivolt per meter (1 mv/m) contours of commonly-owned or controlled stations. During

this period, also, the controlling stockholders of Tidewater -- who were also the proprietors of Station WESR, Tasley, Va. -- filed with the Commission an application to increase the power of that station.

Since the 1 mv/m contour of the proposed operation of the Tasley station would have overlapped the 1 mv/m contour of the Tidewater proposal, the Commission was holding the WESR application in abeyance pending its action on the proposed change in its multiple ownership rule and its decision in this proceeding. Therefore, in order to obtain action on the WESR application, Tidewater petitioned to re-open the record on the Tidewater application and to have an issue added in this proceeding relating to the overlap of the 1 mv/m contours of the proposed WESR operation and of Tidewater's proposed station. On the basis of this proposal to move the overlap issue out of the proceeding on the WESR application and into the proceeding involving the Tidewater application, the Commission, in the Spring of 1964, granted the WESR application, added the overlap issue to the instant proceeding between applicant and Tidewater, and remanded the matter for further hearing by the Examiner on the overlap issue. (App. 3, et seq.)*

Shortly after the Commission entered its order of remand, it adopted the rules it had previously proposed which, it stated, would establish a fixed and firm norm that would preclude the overlap of the 1 mv/m contours of commonly owned or controlled stations.

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*The separate printed appendix is cited herein as "App."

Thereafter, the Examiner held a hearing on the "overlap" issue that had been designated by the Commission, and issued a Supplemental Initial Decision. She found that Station WESR and the Tidewater applicant were commonly controlled. She found there would be overlap of the 1 mv/m contours of the improved WESR facilities and the operation proposed by Tidewater. She concluded, however, that this overlap need not bar a grant of the Tidewater application. (App. 5 et seq.) Appellant filed Exceptions to this Supplemental Initial Decision and argued them before the Commission.

While the matter was awaiting the Commission's decision on this overlap issue, the Commission released its "Policy Statement on Sec. 307(b) Considerations" (6 RR 2d 1901) (hereinafter referred to as the "Policy Statement"). The Policy Statement provided that, whenever the 5 mv/m daylight contour of any proposal would penetrate the boundaries of any community with a population of over 50,000 persons, and having at least twice the population of the applicant's specified community, a presumption would arise that the applicant realistically proposed to serve the larger community rather than the community specified in the application. The Policy Statement further provided that, if the applicant failed to rebut the presumption, he would be treated as an applicant for the larger community and required to meet all the technical provisions of the rules for stations assigned to the larger community; and his application would "be granted only upon the

condition that he amend his application to specify the larger community as his station location." (6 RR 2d 1901, 1907).

The Policy Statement was released on December 27, 1965. On January 3, 1966, counsel for Appellant addressed a letter to the Commission setting forth facts which were, in their opinion, sufficient to rebut the presumption announced in the Policy Statement. (App. 23 et seq.)

On January 20, 1966, the Commission released the Memorandum Opinion and Order which is one of the actions appealed from herein. (App. 31, et seq.) This action (1) confirmed (over the dissent of Commissioner Bartley) the ruling of the Hearing Examiner that the overlap between the 1 mv/m contours of WESR as then operating and of the Tidewater proposal for Smithfield would not bar a grant of the latter application; and (2) remanded both applications for a second supplemental hearing on issues, based on the new Policy Statement, to determine whether the applicants would realistically serve their specified communities or the city of Norfolk[1/] and, if the latter, whether the applicants would meet the technical requirements for Norfolk stations. In Footnote 3 to the Memorandum Opinion and Order, the Commission acknowledged the filing of Appellant's above-described letter, but declined to consider it on the merits.

1/ The 5 mv/m contours of the proposals of both Appellant and of Tidewater surrounded the city of Norfolk; and the population of Norfolk was over 50,000 and more than twice that of both Newport News and Smithfield.

Appellant's proposal met all of the technical requirements for a Norfolk station except for one minor deficiency of a type that the Commission had, in other situations, waived or held to be satisfied by "substantial compliance."[2/] Accordingly, Appellant "demurred" to the additional issues and stated he was satisfied to have the Commission treat his application as one for Norfolk. Tidewater, on the other hand, attempted to rebut the presumption created by the Policy Statement, -- notwithstanding that Smithfield's population is only about 3,000 persons and Tidewater's proposal would serve a total audience of over one million persons.

After the hearing on this second remand, the Hearing Examiner, in a Second Supplemental Initial Decision (App. 36 et seq.) recommended denial of Appellant's application for non-compliance with Sec. 73.188(b)(1). Conversely, however, she held that Tidewater had rebutted the presumption created by the Policy Statement and it had shown that it would "realistically" serve Smithfield rather than Norfolk and that its application should be granted.

Exceptions were taken to the Initial Decision and were argued before the Commission. In its Decision, (App. 69, et seq.), the Commission, correctly, reversed the Examiner's determination with respect to Tidewater and denied its application. However, it also confirmed the dismissal of Appellant's

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2/ Sec. 73.188(b)(1) requires 25 mv/m coverage of the principal business and industrial areas. Appellant's proposal would provide this coverage to only 98% of the industrial and 47% of the principal business districts. It would, however, provide 23.4 mv/m coverage to all of the industrial and 63% of the main business district; and no part of the main business district would receive less than a 17 mv/m signal.

application; -- holding that it would neither waive Sec. 73.188(b)(1) nor find substantial compliance with the rule in order to make possible a grant of Fischer's application.

The Commission's reasons for failing to waive the rule, or to find substantial compliance therewith, were wholly unrelated to the objective nature or magnitude of the deficiency involved.

Although it purported to dismiss both applications, the Commission did not, in legal effect, do so. Both proposals would cause and receive interference that, under Sec. 73.37 of the Commission's Rules, would preclude the acceptance of the applications if filed today. Nevertheless, because it stated it found "specific programming needs for communities in this area" the Commission's Decision invited both applicants to re-file applications that might cause or receive interference equivalent to those being dismissed! Adding injury to insult, it stated it would also receive similar applications from any other parties wishing to file.

ARGUMENT

I

THE POLICY STATEMENT WAS A SUBSTANTIVE RULE MAKING THAT IS VOID BECAUSE OF THE COMMISSIONS'S FAILURE TO COMPLY WITH THE REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

Since Appellant's application was denied by the Commission because of reasons grounded in its Policy Statement on Section 307 (b) Considerations (6RR 2d 1901) it is appropriate, first, to determine whether the Commission erred in invoking that Statement in support of the dismissal of appellant's application.

The Notice of Appeal and Statement of Issues in this appeal both raised a question whether the Policy Statement was consistent with what was thought to be this Court's "mandate" in Miners Broadcasting Service, Inc. v. FCC 121 U.S. App. D.C. 222; 349 F 2d 199 (1965). In view of the intervening decision of the Court in Northeast Broadcasting, Inc. v. FCC, Slip Onipion, July 19, 1968; ____U.S. App. D.C. _____; ____ F 2d _____, we will not pursue that argument.

However, the Court's decision in the Northeast case leaves open, and - indeed - points up,the question of whether the effect of the Policy Statement was not, in fact, so

substantive in nature that it could not validly be adopted and imposed without formal rule making procedures complying with Section 4 of the Administrative Producedure Act, 60 Stat 238-39 (1946); 5 USC 1003.[3/]

In the case of Kessler v. FCC, 117 U.S. App. D.C. 130; 326 F 2d 673, (1963), this Court had before it the question of whether the Commission's action imposing an AM freeze was invalid for failure to comply with Section 4. In that case the Court cited, and indicated agreement with, the following langugae which the Commission had used in distinguishing between procedural rules, which are exempted from the procedural requirements of Section 4, and "substantive" rules as to which such procedures are required:

> "Substantive rules are those which change standards of station assignments..... Since the interim criteria created no new assignment standards.....the AM "freeze" was procedural in nature and not subject to the formal rule making requirements of the administrative procedure act".
> 117 U.S. App. D.C. at p.137

3/ This statute provides, in pertinent part, as follows: "General notice of proposed rule making shall be published in the Federal Register and shall include (a) a statement of the time, place, and nature of public rule making proceedings..... Except where notice or hearing is required by Statute, this sub-section shall not apply to interpretive rules, general statements of policy, rules of agency organization, procedure or practice ....."

Even though the above-cited language was concerned with the difference between substantive rule-making and procedural rule making, rather than the difference between a rule-making and a policy statement, we read it as an admission, twice stated, by the Commission that, when the standards of station assignment have been changed, a substantive rule-making has occurred.

When, on petitions for reconsideration of its action adopting the Policy Statement the Commission was faced with the argument that the Policy Statement was, in fact, a substantive rule making, it attempted to dismiss it with the claim that the Statement had "simply announced new guidelines" (6RR 2d 1908, 1910). However, its language in the Memorandum and Opinion and Order in Monroeville Broadcasting Co. (5RR 2d 547) and in the Policy Statement itself show that, from the start, the Commission intended to determine "what standards should be applied" (5RR 2d at p. 548, par. 4), that it believed, whether erroneously or not, that the Court had ordered it to "establish or clarify standards" (6RR 2d at p. 1904 par.1); that it conceived of the Statement as a vehicle whereby "standards for suburban application [were being] specified." (Ibid, par. 2); and that these standards embodied "a new approach." (Ibid at p. 1905, par.7), and "a new policy" (Ibid at p.1906, par.9).

We submit that, even as a matter of semantics, to "specify" or establish standards for suburban stations "which employ a "new approach" and a "new policy" is no different at all from "changing the standards of assignment" for such stations. (Kessler v. FCC, Supra, p.9), Accordingly, by the Commission's own language, the statement can be shown to have effected a substantive rule-making.

Pragmatically, also, there is ample proof that this was, in effect, a rule-making proceeding.

Prior to the adoption of the Policy Statement, the standards of station assignment allowed, sine altra, the assignment to Newport News of the station proposed by Fischer or the assignment to Smithfield of the station proposed by Tidewater. Under the Policy Statement, as interpreted and applied by the Commission itself, the standards were so changed that neither assignment could be made.

Since, in adopting the Policy Statement, the Commission made no attempt to comply with the requirements of the Administrative Procedure Act which are a prerequisite for the imposition of a substantive rule, it was error for the Commission to apply the provisions of that Statement to appellant's application and, by so doing, to dismiss that application.

II

THE COMMISSION'S APPLICATION OF THE POLICY STATEMENT TO THE INSTANT SITUATION WAS ERRONEOUS AND IMPROPER

A. This Was Not a Proper Situation for the Application of the Policy Statement

The full title of the Policy Statement is "Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities." (Emphasis supplied). The cases cited by the Commission as being those which involved the problem to which the Statement was directed (Monroeville Broadcasting Co., 5RR 2d 547, 548) all involved small towns, bedroom communities or true suburbs of large metropolitan cities. Huntington Broadcasting Co. concerned Huntington Park, contiguous to Los Angeles, within the Los Angeles Urbanized Area and Standard Metropolitan Statistical Area (SMSA) and with a population of less than 30,000. Radio Crawfordsville involved Des Plaines, with a population of less than 35,000 and within the Chicago Urbanized Area and SMSA. Speidel Broadcasting Corp. involved Kettering, Ohio, a city of 55,000 but immediately adjacent to Dayton (over 262,000

population) and part of the Dayton Urbanized Area and SMSA. The Monroeville case, itself, involved,on the one hand, a community with a population of 22,446 and, on the other, communities with populations totalling only 40,000, all within the Pittsburgh Urbanized Area and SMSA.

Rockland Broadcasting Company involved small communities with populations of under 10,000 that were both in the New York-Northeastern New Jersey Urbanized Area and the New York SMSA, Burlington Broadcasting Co. concerned Burlington and Mount Holly, New Jersey with populations of 12,687 and 13,271, respectively, one of which was several miles outside the Philadelphia Urbanized Area, but both of which were within the Philadelphia SMSA. Massillon Broadcasting Company was a proceeding between applicants for Norwood, Ohio, population 34,580 and for Covington, Ky., with a population of 60,376. Norwood is completely surrounded by Cincinnati; and both communities are within the Cincinnati Urbanized Area and SMSA. Seven Locks Broadcasting Co. was a proceeding in which the Commission held that no distinction for Sec. 307(b) purposes could be drawn between applications for the unincorporated areas of McLean, Virginia and Potomac-Cabin John, Maryland, and resolved the conflict not by dismissing both applications but by deciding it under the "standard comparative" issue. In Charles W. Jobbins the question concerned the

communities of Fullerton (population 56,180) and Whittier (population 33,663) both within the Los Angeles-Long Beach Urbanized Area and SMSA. Finally, Radio Haddonfield, Inc. was a case where the Commission had no difficulty drawing a Sec. 307(b) preference between two communities with populations of 13,201 and 8,941 located in different SMSA's.

We have set out the foregoing analysis to demonstrate that, in the full list of all of the cases to which the Commission referred as treating of the problem, there was none involving a community with a size anywhere approaching that of Newport News or involving, as does this, the relationship between the central cities of two separate urbanized areas and SMSA's.

In no sense of the word is Newport News a suburb of Norfolk. Norfolk, with a population of 305,000, is the central city of the Norfolk-Portsmouth Urbanized Area which has a population of 508,000 and of the Norfolk-Portsmouth SMSA which has a population of almost 600,000. Newport News is not included in either.

Far from being a Norfolk suburb, Newport News, with a population of over 110,000 is, itself, the central city of the Newport News-Hampton Urbanized Area and the Newport News-Hampton

SMSA which have populations of 208,000 and 224,000, respectively.

Based on the foregoing, it seems that the instant situation was probably not even one which the Commission intended the Policy Statement to cover, that the Commission's action applying it in this case was therefore erroneous and that the resulting dismissal of appellant's application should therefore be reversed.

B. The Reasons Given by the Commission for the Strict Application of its Coverage Rule Were not Included in the Policy Statement As Promulgated 4/

The ultimate operative reason for the dismissal of appellant's application was its failure to completely provide the 25 mv/m coverage of the main business and industrial areas of Norfolk that would have been required of a Norfolk station. Appellant had taken the position that the coverage that his

4/ This argument and the use, for convenience sake, of the word "suburban" in this argument are both without prejudice to Appellant's position in the prior argument that Newport News is not a suburb of Norfolk and the Policy Statement should not have been applied in this situation in the first place.

proposal would provide over the city of Norfolk was sufficient, under prior Commission precedents, to support a grant of his application. The Commission conceded that it had not, in the past, insisted on full compliance with this coverage requirement but refused to accept the substantial compliance presented by Appellant's application -- or to waive the rule -- solely on the grounds that it was:

> "not persuaded that Fischer's application for a new facility warrants grant as a Norfolk station." (App. 74, par. 8)

The Commission said it was not persuaded because:

1. "...there are ample stations in Norfolk and throughout the metropolitan area; and

2. "Fischer ha[d] failed to provide any explanation for the inconsistency between his present willingness to adopt Norfolk as his community and his prior avowals concerning Newport News." (Ibid)

That the first reason given was not a proper one is seen from the fact that nowhere in the Policy Statement was there any suggestion whatsoever that, by agreeing to have his application judged by the technical standards applicable to the central city, an applicant would assume the obligation to demonstrate that the central city had a greater need for the origination service from the proposed station than did the community for which he had originally applied.

As far as concerns the second reason, it is essentially a recapitulation of paragraphs 6 and 7 of the Decision (App.73) where the Commission had (in paragraph 6) discussed the apparent need of Newport News for another station, and had (in paragraph 6) noted that "While [Appellant] recognized his obligation to serve his entire proposed listening area [i.e. including Norfolk], it is abundantly clear that the principal emphasis of his program proposed was placed upon the needs of his listeners outside of the Norfolk-Portsmouth Urbanized Area." The Commission concluded paragraph 7 by criticizing Fischer for allegedly abandoning Newport News for Norfolk for the sole (and apparently wholly unworthy) purpose of obtaining a grant of his application.

When the above arguments are read against the text of the Policy Statement, it is clear that here, also, the Commission is invoking and applying a rule or policy that goes well beyond what was contained in the Policy Statement itself or could have been reasonably inferred from its language.

The language of the Policy Statement dealt with the "suburban" problem primarily in technical terms. The presumption created by the Statement is invoked when a signal of a certain stipulated intensity invades a community of a certain stipulated magnitude. Where the presumption is not rebutted,

the Statement requires that the applicant meet the technical requirements of the Commission's rules with respect to service over the larger community and provides that, if those standards are met, the application will be granted "upon the condition that [the applicant] amend his application to specify the larger community as his station location." However, other language, contained in the same sentence, warns that, under these circumstances, the applicant will "be accorded only the 307(b) preference to which that larger community is entitled..." 6RR 2d at p. 1907.

Read in the context of the balance of the Policy Statement, and of its stated objectives, this language seems to mean no more than that, if an applicant seeks to obtain special consideration under Section 307(b) by specifying a suburban community -- but fails to meet the presumption created by the Policy Statement -- the application will be judged, for Section 307(b) purposes, as if it were one for the larger community and, accordingly, the application must be amended to specify that community as the community of license. Nowhere in the Policy Statement is there any indication that, under these circumstances, the application would be treated, <u>in all respects</u>, as one for the central city, that the applicant would be

considered to have completely abandoned his proposal to serve the city originally designated to the point that his motives in connection with such abandonment would be of decisional significance and that even his programming would be re-evaluated in terms of the broadcast needs and interests of the inhabitants of the central city.

That even the Commission did not conceive that the Policy Statement would be applied in this manner is seen from the case of V.W.B., Inc. (12RR 2d 849 (Memorandum Opinion and Order of the Review Board); 13RR 2d 487 (Memorandum Opinion and Order of the Commission)). This case, which came before the Commission several months after its Decision in the instant case, involved an applicant for Bridgeton, North Carolina, a town in the township immediately adjacent to that of the city of New Bern, North Carolina. The matter was designated for hearing by the Commission on issues, dictated by the Policy Statement, to determine whether the proposal would realistically provide a local transmission service for Bridgeton for for New Bern and, if the latter, whether the proposal met all of the technical requirements for New Bern. The Commission included no issue as to programming; and it was only when the matter was brought before the Review Board on an intervenor's petition

for clarification or enlargement of issues, that anyone gave any thought at all as to whether such an issue was appropriate in such a proceeding. The Review Board did add such an issue and issued other orders, and three different parties (including the Commission's Broadcast Bureau) applied to the Commission for review. The Commission took the fairly unusual step of granting review of this interlocutory matter and issued a Memorandum Opinion and Order thereon. 13 RR 2d 487.

Although the Memorandum Opinion and Order dealt primarily with procedural matters, they were procedural matters which related to matters of programming and of "service" in the programming sense. Considering these problems, the Commission admitted that it was "persuaded by the other parties that there are serious questions concerning the administration of the 307(b) Policy Statement..."; and that the question of providing different programming for the central city than for the suburban community "presents a problem which was not contemplated or considered when the 307(b) Policy Statement was drafted." 13RR 2d at p. 490. Accordingly, on the same day that it released that Memorandum Opinion and Order, the Commission also issued a "Clarification" of its Policy Statement,

13RR 2d 1901. This "Clarification" states, for the first time, that an applicant who had previously specified a suburban community must amend his program proposal if he decides to have his application considered as one for the central city; and it thereby gives notice, for the first time, that, to the extent that the program needs and interests of the central city are different from those of the suburban community, the applicant's program proposal will be judged against those of the former, rather than the latter city.

Notwithstanding that this announcement came only months after the final Decision in this case, and that the Commission, in its simultaneously released action in the V.W.B., Inc. case, freely admitted that this was "a problem which was not contemplated or considered when the 307(b) Policy Statement was drafted" (supra) it is apparent from paragraph 6 of the Commission's Decision on appellant's application (App. 73) that this was one of the major considerations of the Commission in denying his application.

To re-capitulate. The Commission assigned three reasons for its refusal to waive the coverage rule (or to accept substantial compliance therewith) in order to grant the Fischer application:

(1) The matter of the "principal emphasis" of his program proposal;

(2) The allegedly unexplained "inconsistency" and question of a motive in his "abandoning" Newport News for Norfolk; and

(3) The alleged apparent greater need of Newport News for the station than that of Norfolk.

It was not apparent from the Policy Statement that any of these factors would be considered germaine or relevant to cases arising under the Statement. The relevance of program "emphasis" was not known until the Commission issued its "Clarification", years after the adoption of the Policy Statement, itself, and several months after release of its Decision herein; and, since service is a function of programming, the question of "abandonment" was not discernible either until the "Clarification" spoke to the question of programming. The third factor was never even intimated in the Policy Statement itself, nor in the subsequent Clarification. However, it will be dealt with in the following section.

C. If Newport News has a Greater Need than Norfolk, the Commission Should have Granted Appellant's Application as for Newport News

Immediately following the release of the Policy Statement, on January 3, 1966, Appellant addressed a letter to the Commission setting forth facts that seemed sufficient to rebut the presumption of the Policy Statement as it applied to Appellant's application. This letter is set out in full at App. 23, et seq. The facts it contained were all matters of which the Commission could take official notice, from its own records, from Census Bureau figures or from Appellant's application. The arguments it advanced represented, in effect, a demurrer to the Policy Statement, or a request for a partial summary judgment that the presumption of the Policy Statement was not applicable to Appellant's application for Newport News. This letter was submitted immediately after the adoption of the Policy Statement, when there were no guidelines at all available for any applicants, and another reason for the letter was the hope that it might elicit some indication of what factors the Commission would consider relevant in dealing with cases under the Policy Statement and what procedures the

Commission would follow in those cases.[5/]

In its Memorandum Opinion and Order remanding Appellant's application for further hearing under issues relating to the Policy Statement, the Commission completely ignored the letter except to say, in a footnote, that it would not consider it. (App.33).

Since Appellant's letter had contained virtually all the facts that Appellant considered relevant to a determination under the Policy Statement, and since the Commission had -- by designating the matter for further hearing -- in effect overruled Appellant's demurrer or request for partial summary judgment, Appellant concluded (reasonably, we submit) that it was fruitless to try and rebut the presumption as it applied to Newport News; and he determined to take the alternate route which the Policy Statement appeared to leave open, i.e. to consent to have his application considered as one for Norfolk.

In so doing he did not amend the programming portion of

5/ Note that, in the footnote to its Clarification of the Policy Statement, 13 RR 2d at p. 1902, the Commission admits that there are <u>still</u> no procedural guide-lines for applicants in multiple proceedings such as the instant one.

his application because there was nothing in the Policy Statement that indicated he should. He did not believe he was "abandoning" Norfolk for Newport News, because there was nothing in the Policy Statement, nor in his action, to indicate that he was. In consenting, as the Commission reports that he did (App.72) "to have his application treated as a proposal for a Norfolk station, he believed (and reasonably, we submit) that it would be "treated as a proposal for a Norfolk station" only from the point of view of compliance with the technical requirements for Norfolk and for Section 307(b) purposes. He assumed (reasonably, we submit) that if his application were granted, he would still program, as he had originally proposed, with "principal emphasis" directed to Newport News.[6/] He never dreamed, nor was there any reason for

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6/ The Commission allows many stations to direct the principal emphasis of their programming to different cultural or ethnic groups within the community so long as they recognize an obligation to provide some other programming for other parts of the community. (Good Music Stations, Spanish Language Stations, etc.). There is, therefore, no reason why an applicant would not be allowed to direct the principal emphasis of its programming to one geographical component within the community so long as it recognized (as the Commission stated Appellant did) an obligation to provide some programming for other parts of its service area.

him to do so, that by allowing his application to be treated as one for a Norfolk station that he thereby assumed the burden of proving that the presumption of the Policy Statement was correct and that Newport News did not have radio needs different from or greater than Norfolk.

We have shown, in the preceding argument, that the introduction of these various factors to defeat a grant of Appellant's application is one of the reasons why the Commission's action herein should be reversed. What is important for this argument is that the Commission, in considering these various factors, made a determination that the needs of Newport News were greater than those of Norfolk (App. 73, par. 7) and that, in so doing, it considered and gave credence to Appellant's letter of January 3, 1966:

Appellant concedes that there is no reason why the Commission should not, in its Decision, consider his letter of January 3, 1966 but submits that the Commission's action in so doing indicates that it was error for it to have refused to consider the letter on its merits when it was before it in 1966. Inasmuch as the Decision contains a determination, based on facts recited in Appellant's letter, that Newport News has radio needs different from and greater than those of Norfolk, there is no reason why the Commission should not have

made that determination responsive to Appellant's letter when the letter was first submitted to it in 1966. Moreover, since Fischer's application originally specified Newport News, since he had never changed his programming to direct its "principal emphasis" away from Newport News and since the application had been determined to be in all other respects acceptable, the Commission could, and should, have granted the application as one for Newport News if it did not want to grant it as one for Norfolk.

III

IN VIEW OF THE OVERLAP BETWEEN THE TIDEWATER PROPOSAL AND WESR, THE COMMISSION SHOULD HAVE DISMISSED THE TIDEWATER APPLICATION

Having previously granted the application of WESR (owned by some of Tidewater's principals) to increase its power, the Commission, on April 30, 1964, released its corrected Order remanding this matter to the Hearing Examiner for further proceedings to determine whether the resulting overlap of service between the Tidewater proposal and WESR "would be in contravention of the provisions of Sec. 73.35 (a) [73 CFR 35(a)] of the Commission's Rules with respect to multiple ownership of standard broadcast stations and, if so, whether circumstances exist which would justify waiver of the rule." (App. 3, 4)

During the pendency of this remand, on June 9, 1964, the Commission released its Report and Order in Docket No. 14711 (2 RR 2d 1588) amending Sec. 73.35 of its Rules by adopting a "fixed standard" and "fixed rule" prohibiting the common ownership and/or control of standard broadcast radio stations with overlapping 1 mv/m contours. (Ibid at pp. 1594, 1595 and passim. See Appendix A hereto for text).

At the time of the hearing on this remand there were pending before the Commission mutually exclusive applications seeking construction permits for new stations to operate at Catonsville, Maryland and Lebanon, Pennsylvania, on the same frequency as that applied for by Tidewater. Some of these applications have since been consolidated and others dismissed, but the proceeding is still pending between one applicant for Lebanon and one for Catonsville (Radio Catonsville, BP-16106). Although a station at Lebanon would cause no interference to the Tidewater proposal, a station at Catonsville, being considerably closer, would. Accordingly, in her Supplemental Initial Decision, the Examiner made findings with respect to what would be the extent of overlap of interference-free service between WESR and the Tidewater proposal depending on which of the then pending applications was granted.

Assuming denial of all the Catonsville applications 7/, the overlap of interference-free service would involve 58,325 persons in 1,005 square miles, representing 5.74% of the

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7/ Actually, because of the issues on which they were designated for hearing, it is quite possible that neither of the two remaining applications will be granted. In fact that is the position taken by the Broadcast Bureau in its Proposed Findings in Dockets 15835 and 15839, dated 3/28/68.

population that would receive interference-free service from the Tidewater proposal and 48.36% of the population that receives such service from WESR. (App. 14) The prohibited overlap of 1 mv/m contours would involve 22,946 persons in 411 square miles (App. 14).

Assuming grant of the Radio Catonsville application, the interference-free overlap area would still involve 25,591 persons in 376 square miles, representing 2.63% of the Tidewater interference-free service population and 21.21% of that of WESR; and the prohibited overlap of 1 mv/m contours would still involve 10,547 persons in 141 square miles (App. 14, 15).

The Examiner found that WESR is the only station on the Eastern Shore of Virginia (App. 17). She found (App.13) that Tidewater would provide a signal in excess of 0.5 mv/m over Tasley, although grant of any Catonsville applications would create interference to the Tidewater signal at that point. She also found that the population of Tasley was 742 persons (App.16). Under Sec. 73.182(f) of the Commission's Rules [73 CFR 182(f)], a signal of 0.5 mv/m is adequate to provide primary service to a community of this size.

At the time of the remand, before the June 9, 1964 amendment of Section 73.35(a), that rule had contained no

"fixed standard" or "fixed rule" with respect to overlap, but had allowed the Commission to consider each situation on a case-by-case, ad hoc basis. The Examiner's Supplemental Initial Decision expressed doubt as to whether the old rule or the new rule applied. She held, however, that the old rule was applicable, and that "as reflected in the foregoing findings, Tidewater [had] met [its] criteria" (App.21). No further reason was ascribed for that conclusion. Alternatively, she held that, if the new rule were applicable, "it is believed that Tidewater has met the burden necessary for a waiver of such rule" (App.22). Similarly, no reason was ascribed for that conclusion.

When the matter was appealed to the Commission, on Appellant's Exceptions to this Initial Decision, the Commission, with Commissioner Bartley dissenting, held that it was "of the view that the new rules with their more stringent requirements apply to this proceeding..." but it "agree[d] with the Examiner's conclusion that waiver of these rules...is warranted." (App.32).

The reason which the Commission gave for waiving the rule was was follows:

> "The overlap of the 1 mv/m contour of the Tidewater proposal for Smithfield and that of Station WESR, Tasley, Virginia, in which two of Tidewater's principals own interests, will occur mainly over a large body of water and adjacent, uninhabited marsh land. The overlap was occasioned in large measure by the substantial salt water paths of high conductivity which occur between Smithfield and Tasley. Moreover, separated as they are by large bodies of water, Smithfield and Tasley are clearly separate and distinct communities. Thus we hold that the overlap of 1 mv/m contours does not bar a grant of the Tidewater application." (Ibid.)

We earnestly submit that the reasons given by the Commission were in no way responsive to the question before it. It is apparent from the Report and Order adopting the amendment to the multiple ownership rules that the Commission intended to adopt a rather inflexible standard that would preclude the overlap of the 1 mv/m contours of commonly-owned stations in all but the most extraordinary circumstances. (See citations supra at p. 28)

Even under the ad hoc approach of the old rule which the Commission, in its above-quoted language, admitted was less "stringent" than the new one, this situation would have been precluded. One reason is that because -- unless the Catonsville application were granted, creating interference to the Tidewater signal over the community of Tasley -- Tasley

would receive interference-free, primary service from the Tidewater proposal. Under the prior, less "stringent" rule, where one of two commonly-owned or controlled stations provided primary service not only to the area between the two communities but also over the community to which the second station was licensed, this fact was considered "of sufficient degree as would, evaluated by itself, normally constitute a serious bar" to authorization of the second station. Fetzer Broadcasting Co. (3 RR 884, 893). Subsequent treatment of such overlap situations by the Commission was equally demanding. In Westbrook Broadcasting, Inc. (17 RR 312, 321) the Commission held that in such cases, the applicant had the two-fold burden of demonstrating not only that this "duality" of service would not be deleterious to the public interest but, additionally, of making a "strong, affirmative showing that the public interest would be served by the multiple ownership situation." (See also Ibid. at p. 323)

In that case the Commission added that "in circumstances such as this, the Commission has, virtually without exception, denied applications for broadcast authorizations. (Ibid. at p. 321, par.5). And note that the bar of the rule was applied equally where the community involved had a population under 2,500 (as is the case here) and the applicant's existing

station served it with a 0.5 mv/m signal. Paul A. Brandt, 19 RR 42(c), 43.

In the instant case, the Commission could point to no indication whatsoever of any "strong affirmative showing that the public interest would be served" which, in the Westbrook case, the Commission said was essential for a grant in this type of situation. This being the case, it is difficut to understand how the Commission could sanction this overlap under its admittedly "more stringent" new rule.

Moreover, because of the wording of the new rule, it was necessary for the Commission to take affirmative action waiving the rule. In its recent action in Central New York Cable TV, Inc., 11 RR 2d 1065, 1069, the Commission noted that:

> "Obviously a person asking the Commission not to apply a rule which it has adopted is expected to provide a full and detailed justification for the exception."

In the instant case, Tidewater offered no such justification and those adopted by the Commission were, as will now be shown, wholly irrelevant.

The fact that Smithfield and Tasley are "clearly separate and distinct communities" is no reason to waive the rule. In every instance when the Commission has applied the overlap rule, both before its amendment (see cases, supra) and since

(see infra) the communities involved were "clearly separate and distinct".

The fact that the overlap was caused by "substantial salt water paths of high conductivity [between] Smithfield and Tasley" is, similarly irrelevant. The propogation of a station is a function of many factors (including frequency and power as well as the conductivity of the terrain over which the signal passes). The overlap results as much from the high power designated in the Tidewater application as from the conductivity of Chesapeake Bay. The Memorandum Opinion and Order adopting the new rule prohibiting 1 mv/m overlap (2 RR 2d 1588) held that it was the effect of the overlap that was to be avoided; and ascribed no relevance to the various factors by which it was caused. As a matter of fact, the Commission's Review Board has held in a case involving the similarly prohibited overlap of the Grade B contours of commonly-owned television stations, that, since "the Commission was aware of terrain problems when amending the overlap rules....", such factors were not relevant even to support a request for a hearing on the question of whether a waiver should be granted! (American Colonial Broadcasting Corporation, FCC 64 R-494; Mimeo 58449, released October 22, 1964.) A fortiori, such considerations should not be relevant to support a waiver.

Finally, and most important, is the fact that the rationale of the Commission's decision centers on the irrelevant fact that much of the overlap area is over water and uninhabited marsh land and completely ignores the fact that it will still affect significant areas inhabited by tens of thousands of persons, representing highly significant percentages of the total population served by WESR.

Although we concede the ultimate authority of the Commission to waive its overlap rule on a proper determination supported by an adequate showing, we submit that the burden on Tidewater and the Commission under the philosophy expressed by the Commission in amending the overlap rule (2 RR 2d 1588) was a heavy one ab initio; that the fact that the overlap of interference-free primary service could [and probably will] include all of Tasley, that there is no other station on the Eastern Shore of Virginia to provide a diversity of locally originated service and that the overlap of interference-free primary service could include almost half of the audience receiving primary service from WESR all made the burden of supporting such a waiver even greater; and that the reasons alleged by the Commission for waiving the rule were all unsupported and irrelevant and, in any event, inadequate to meet this heavy burden.

Accordingly the Commission's action of January 20, 1966, waiving its rule to allow further processing of the Tidewater application (App. 31 et seq) and its subsequent action, at Fn. 20 of its Decision herein (App. 81), prospectively waiving the rule to allow the refiling of the Tidewater application, are erroneous and should be reversed and the Tidewater application should be dismissed.

IV

THE COMMISSION SHOULD NOT HAVE INVITED THE FILING OF NEW APPLICATIONS BY APPELLANT AND OTHERS

The ultimate injury done to appellant (and to Tidewater as well, if the Commission had not previously erred in failing to dismiss its application because of its overlap problem)[8/] was its action inviting the filing of new applications and opening up the proceeding to other new applicants. Even if the Commission's determinations under its Policy Statement were correct, it still could, and should, have reached a decision between the applications that it had before it - even it that would have required yet another remand.

If the Commission preferred a station in Norfolk it could have waived its rule and granted Fischer's application as for a Norfolk station or it could, if it deemed it necessary, have instructed him to attempt to find a new site that would provide 25 mv/m to all of the business and industrial areas

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8/ The references to Tidewater in this section of the brief are without prejudice to Appellant's position that the Tidewater application should have been dismissed for violation of the Commission's multiple ownership rules.

of Norfolk. If, as now seems the case, the Commission preferred a Newport News station, it could have granted Fischer's application as for Newport News. If it wanted further evidence as to whether Appellant could, or would, direct the "principle emphasis" of his programming to Norfolk (cf. App 73, par. 6), it could have ordered a further remand for that purpose. If it preferred a low power station to serve Smithfield, it could have advised Tidewater to attempt to appropriately amend its application. Certainly, after keeping these two applications pending for nine years, and putting the applicants through three different hearings, the Commission had an obligation to make a decision between them if it could - as it clearly could - do so without violating its rules.

The filing of new applications will give the Commission no options that were not available to it by considering those already pending before it. Conversely, it will require that the whole adjudicatory process start all over again. This new and wholly unnecessary proceeding will further glut the Commission's admittedly over-burdened procedures, will impose significant additional expense on both the applicants and the Commission and will impose further extended delays on appellant and on the public that will ultimately receive this new service.

From the very beginning, the Commission had found both appellant and Tidewater to be, in all respects, fully qualified applicants. (App. 69). Both of them have pursued their applications diligently over a nine year period through delays not of their own making and through substantial changes in the Commission's rules. No aspect of the public interest or of the Commission's rules demands the forfeiture of the time, energy and funds they have invested in their respective applications. To the contrary, Section 1.227(b) of the Commission rules extends to all applicants a reasonable expectancy that, once their applications have been designated for hearing they become reasonably immune from competition from other applicants, seeking the same or other mutually exclusive facilities, who had not filed their applications prior to the cut-off date. Consderations of basic fairness, equity, administrative due process and the Commission's own self interest and obligation to avoid unnecessary proceedings all require that the Commission observe the spirit of Section 1. 227 (b) and that it seek a resolution of this proceeding that would not open it up to an undetermined number of new applicants. If for no other reason, this fact demands that the Court reverse the Commission's Decision herein.

CONCLUSION

The foregoing Argument demonstrates to the Court a number of different errors on the part of the Commission, anyone of which requires reversal.

It has been demonstrated that the Policy Statement represented a substantive rule making which cannot have any legal effect since the Commission failed to comply with the procedural requirements of the Administrative Procedure Act which are pre-requisites to the validity of such a rule. It has been demonstrated that, even if the Policy Statement were not totally invalid, it should not have been applied to the instant situation; and, even if it could properly be applied to the instant situation, it was applied in an improper manner. All of these arguments lead to the same conclusion: that the Commission acted improperly in denying Appellant's application when considering it as one for a Norfolk station, but it has also been demonstrated that, wholly apart from technical considerations of the Policy Statement, the Commission should have granted Appellant's application, as originally filed specifying Newport News.

It has also been shown that the competing application of Tidewater was defective and should have been dismissed so

that it was unnecessary for the Commission to consider any comparative factors between the two applications, either under Section 307(b) of the Communications Act, or otherwise.

Finally, we have demonstrated that, even if all the foregoing arguments were invalid and there were no other infirmity in the Commission decision, the Commission committed substantial and prejudicial error in inviting the filing of new applications and opening the matter up to other applicants.

Only if all of the above arguments are resolved against Appellant can the Court sustain the Commission's action herein.

Respectfully submitted,

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By_____

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October 1, 1968

§ 1.227 Consolidations.

(a) The Commission, upon motion or upon its own motion, will, where such action will best conduce to the proper dispatch of business and to the ends of justice, consolidate for hearing:

(1) Any cases which involve the same applicant or involve substantially the same issues, or

(2) Any applications which present conflicting claims.

(b)(1) In broadcast cases, no application will be consolidated for hearing with a previously filed application or applications unless such application, or such application as amended, if amended so as to require a new file number, is substantially complete and tendered for filing by whichever date is earlier: (i) The close of business on the day preceding the day the previously filed application or one of the previously filed applications is designated for hearing; or (ii) the close of business on the day preceding the day designated by public notice published in the Federal Register as the day any one of the previously filed applications is available and ready for processing.

NOTE: Subdivision (ii) of this subparagraph applies only to standard broadcast applications for new stations or for major changes in the facilities of authorized stations. See also § 1.571 (c) and (h) and § 1.591(a).

(2) In non-broadcast cases other than common carrier cases, any application that is mutually exclusive with another application or applications already designated for hearing will be consolidated for hearing with such other application or applications only if the later application in question has been filed within 5 days after public notice has been given in the Federal Register of the Commission's order which first designated for hearing the prior application or applications with which such application is in conflict.

(3) In common carrier cases, except those involving Domestic Public Radio Services, any application that is mutually exclusive with another previously filed application will be considered with such prior filed application only if the later filed application is substantially complete and tendered for filing prior to the close of business on the day preceding the day the earlier filed application is designated for hearing. In the Domestic Public Radio Services no application will be consolidated for hearing as mutually exclusive with a previously filed application or applications unless such application, or such application as amended so as to constitute a major change therein as defined in § 21.33 of this chapter, is substantially complete and tendered for filing by whichever date is earlier: (i) The close of business 1 business day preceding the day on which the Commission designates the earlier filed application for hearing; or (ii) within 60 days after the date of the public notice listing the first prior filed application (with which subsequent applications are in conflict) as having been accepted for filing. An application which is subsequently amended by a major change will, for the purpose of this section, be considered to be a newly filed application. Where major changes which do not relate to the mutually exclusive aspect of a proceeding are warranted, or in the case of multiple mutually exclusive issues where the warranted major changes serve to resolve one or more of the issues but do not relate to the mutually exclusive aspect of the proceeding, such changes or amendments will not serve to alter the existing mutually exclusive status so long as new conflicts are not created.

(4) Any mutually exclusive application filed after the date prescribed in subparagraphs (1), (2), or (3) of this paragraph will be dismissed without prejudice and will be eligible for refiling only after a final decision is rendered by the Commission with respect to the prior application or applications or after such application or applications are dismissed or removed from the hearing docket.

[*§ 1.227(b)(3) amended eff. 7-29-68; I(68)-1*]

§ 1.229 Motions to enlarge, change, or delete issues.

(a) A motion to enlarge, change or delete the issues may be filed by any party to a hearing.

(b) Such motions must be filed with the Commission not later than 15 days after the issues in the hearing have first been published in the Federal Register. Any person desiring to file a motion to enlarge,

§ 73.35 Multiple ownership.

No license for a standard broadcast station shall be granted to any party (including all parties under common control) if:

(a) Such party directly or indirectly owns, operates, or controls one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mv/m groundwave contours of the existing and proposed stations, computed in accordance with § 73.183 or § 73.186; or

(b) Such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an officer or director of any other standard broadcast station if the grant of such license would result in a concentration of control of standard broadcasting in a manner inconsistent with public interest, convenience, or necessity. In determining whether there is such a concentration of control, consideration will be given to the facts of each case with particular reference to such factors as the size, extent and location of areas served, the number of people served, classes of stations involved and the extent of other competitive service to the areas in question. The Commission, however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven standard broadcast stations.

NOTE 1: The word "control" as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised.

NOTE 2: In applying the foregoing provisions to the stockholders of a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

NOTE 3: Paragraph (a) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities. Said paragraph will not apply to applicatons for increased power for Class IV stations, to applications for assignment of license or transfer of control filed in accordance with §§ 1.540(b) or 1.541(b) of this chapter, or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy where no new or increased overlap would be created between commonly owned stations. Said paragraph will apply to all applications for new stations, to all other applications for assignment or transfer, and to all applications for major changes in existing stations except major changes that will result in overlap no greater than that already existing. (The resulting overlap areas in such major change cases may consist partly or entirely of new terrain. However, if the population in the resulting overlap areas substantially exceeds that in the previously existing overlap areas, the Commission will not grant the application if it finds that to do so would be against the public interest, convenience, and necessity.) Commonly owned stations with overlapping contours prohibited by paragraph (a) of this section may not be assigned or transferred to a single person, group, or entity, except as provided in this Note.

§ 73.182

(f) The signals necessary to render primary service to different types of service areas are as follows:

Area	Field intensity groundwave[1]
City business or factory areas	10 to 50 mv/m.
City residential areas	2 to 10 mv/m.
Rural—all areas during winter or northern areas during summer	0.1 to 0.5 mv/m.
Rural—southern areas during summer	0.25 to 1.0 mv/m.

[1] See § 73.184 for curves showing distance to various groundwave field intensity contours for different frequency and ground conductivities and § 73.183.

All these values are based on an absence of objectionable fading, either in changing intensity or selective fading, the usual noise level in the area, and an absence of limiting interference from other broadcast stations. The values apply both day and night but generally fading or interference from other stations limits the primary service at night in all rural areas to higher values of field intensity than the values given. The Commission will authorize a directive antenna for a Class IV station for daytime operation only with power in excess of 250 watts. In computing the degrees of protection which such antenna will afford, the radiation produced by this antenna shall be assumed to be no less, in any direction, than that which would result from non-directional operation, utilizing a single element of the directional array, with 250 watts.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,942

EDWIN R. FISCHER,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

THE TIDEWATER BROADCASTING COMPANY, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant, Edwin R. Fischer, appeals from a decision of the Federal Communications Commission which denied his application for a construction permit for a new standard broadcast station to operate in Newport News, Virginia (A. 69-83).[1/]

1/ This decision also denied the application of intervenor, The Tidewater Broadcasting Company, Incorporated. Tidewater has sought and been denied reconsideration by the Commission. 14 Pike and Fischer, R.R. 2d 161 (1968). It filed a Notice of Appeal with this Court on October 14, 1968, Case No. 22,400. The denial of the Tidewater application is independent and apart from the denial of Fischer's application and will not be discussed herein.

73.188(b)(1), 47 CFR 73.188(b)(1),[2/] of the Commission's rules since he would provide a 25 mv/m service to only 98% of Norfolk's main industrial area and to only 47% of its main business district.

Fischer, in turn, argued that his coverage amounted to substantial compliance with the Commission's rules and that, in any event, the Commission should waive Section 73.188(b)(1).

The Commission disposed of his arguments as follows (A. 74):

> We recognize that in the past Section 73.188(b)(1) has been waived and that grants have been made without absolute compliance with all of the provisions of that rule. However, in view of all of the circumstances in this proceeding, we are not persuaded that Fischer's application for a new facility warrants grant as a Norfolk station. In paragraph 9 of the 307(b) Policy Statement we pointed out that we "wish to discourage any proposal that will be merely a substandard central city station," and in paragraph 11 we clearly stated that an applicant, who fails to rebut the 307(b) Policy Statement presumption, as Fischer has failed to do, and who fails to meet all of the requirements for that central city, will be denied. As noted above, there are ample stations in Norfolk and throughout the metropolitan area, and Fischer has failed to provide any explanation for the inconsistency between his present willingness to adopt Norfolk as his community and his prior avowals concerning Newport News. For all of these reasons, it is clear that Fischer has not made a sufficient showing to justify either a waiver of Section 73.188(b)(1) or a finding of substantial compliance with that rule. Since the 307(b) Policy Statement was specifically adopted to assist us in making fair, <u>efficient</u>, and equitable allocations of standard broadcast facilities in metropolitan areas, we are convinced that it would be wholly inappropriate under the circumstances of this proceeding to permit Fischer to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b).

2/ Section 73.188(b)(1) reads as follows:

(b) The site selected should meet the following conditions:

(1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.

ARGUMENT

I. THE COMMISSION PROPERLY APPLIED ITS 307(b) POLICY STATEMENT TO THE FISCHER APPLICATION.

Fischer's proposal for Newport News would place a 5 mv/m signal over Norfolk, a community nearly three times as large as Newport News and over 50,000 in population (namely, 304,869). These facts made it necessary for Fischer, under the Commission's new 307(b) Policy Statement, to establish at a remand hearing that his proposal was realistically one for Newport News rather than for the larger city of Norfolk.

The Commission's Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190, was issued on December 27, 1965. The Commission observed therein that as power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. Primarily for this reason, the Commission concluded that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified location. At the same time, the Commission noted that this presumption was rebuttable

here. He challenges the Statement's application to him in three respects: (1) Newport News, Fischer contends, is not the type of community to which the Policy Statement's presumption was intended to apply; (2) his application for waiver was denied for reasons which were not given in the Policy Statement, and (3) the Commission should have considered a letter Fischer sent to the Commission before the remand hearing as being sufficient evidence to rebut the Policy Statement's presumption. We will discuss each point seriatim.

A. The 307(b) Policy Presumption Arises Solely On The Basis Of Objective Criteria. There Are No Implied Or Explicit Exclusions Therefrom.

Fischer claims (Br. 12-15) that the Commission's 307(b) Policy Statement "probably" was not intended to apply to a community such as Newport News. He argues that Newport News is not a suburb but a central city in its own right with a population of over 100,000. He supports this contention by referring to a series of communities in which the Commission considered the central city coverage problem. Each of these instances, he submits, presents demographic proportions quite different from Newport News and Norfolk and supports his contention that Newport News is a central city in its own right. Initially, Fischer's argument is faulty because he failed at any point to present this contention to the Commission (47 U.S.C. 405). In addition, however, there is no merit to his argument that the Policy Statement is not applicable here.

presumption clearly arises. If, indeed, he believed that the Policy Statement was not applicable because of Newport News' own central city nature, Fischer had the opportunity at the time of the remand hearing to offer evidence to this effect. The record indicates, however, that he failed to offer any evidence in rebuttal to the presumption.

B. In Seeking A Waiver Of A Valid Commission Rule, It Was Incumbent Upon Fischer To Justify His Waiver Request; It Was Not Error For The Commission To Discuss Showings Which Could Have Been Made.

When this proceeding was remanded to the examiner for consideration of Fischer's application in light of the Commission's 307(b) Policy Statement, Fischer asked that the Commission consider his proposal as if it were, in fact, one for the larger, central city of Norfolk. Consistent with this position, he offered no evidence to rebut the presumption that his application was for Norfolk. The Commission denied Fischer's request, however, because his proposal, if considered as one for Norfolk, would not comply with §73.188(b)(1) [3/] of the rules since it would provide 25 mv/m service to only 98% of Norfolk's main industrial area and to only 47% of its main business district.

Fischer's sole justification for non-compliance with this technical requirement was summarized by the Commission as follows (A. 72):

3/ Section 73.188(b)(1) provides that the site selected for location of a transmitter should meet the following conditions: "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

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1/ This decision also denied the application of intervenor, The Tidewater Broadcasting Company, Incorporated. Tidewater has sought and been denied reconsideration by the Commission. 14 Pike and Fischer, R.R. 2d 161 (1968). It filed a Notice of Appeal with this Court on October 14, 1968, Case No. 22,400. The denial of the Tidewater application is independent and apart from the denial of Fischer's application and will not be discussed herein.

The Commission agrees, in substance, with the statement of the case presented in Fischer's brief. However, the characterization of the Commission's final decision beginning on page 7 is argumentative and suffers from brevity. Therefore, to aid the Court in understanding the Commission's decision, we offer the following:

Before the Commission decided to remand this proceeding to the examiner for consideration of the 307(b) presumption, Fischer directed a letter to the Commission in which he stated that he was aware of the impact of the new Policy Statement on his application but that he still believed his application to be best suited for Newport News, the city for which he had originally applied (A. 23-30). However, when the prehearing conference began in February 1966, Fischer stated that he intended to amend and apply for Norfolk (Tr. 1201). In his oral argument before the Commission on December 11, 1967, Fischer again stated that he wished to be considered a Norfolk applicant (Tr. 1523). In keeping with this position, Fischer offered no evidence at the hearing to rebut the presumption that his application was realistically one for Norfolk instead of for Newport News (A. 51).

Both the examiner and the Commission concluded that Fischer's proposal would have to be denied because of his failure to comply with the technical provisions of the Commission's rules for stations assigned to Norfolk. More specifically, Fischer's application was found to be in non-compliance with Section

73.188(b)(1), 47 CFR 73.188(b)(1), [2/] of the Commission's rules since he would provide a 25 mv/m service to only 98% of Norfolk's main industrial area and to only 47% of its main business district.

Fischer, in turn, argued that his coverage amounted to substantial compliance with the Commission's rules and that, in any event, the Commission should waive Section 73.188(b)(1).

The Commission disposed of his arguments as follows (A. 74):

> We recognize that in the past Section 73.188(b)(1) has been waived and that grants have been made without absolute compliance with all of the provisions of that rule. However, in view of all of the circumstances in this proceeding, we are not persuaded that Fischer's application for a new facility warrants grant as a Norfolk station. In paragraph 9 of the 307(b) Policy Statement we pointed out that we "wish to discourage any proposal that will be merely a substandard central city station," and in paragraph 11 we clearly stated that an applicant, who fails to rebut the 307(b) Policy Statement presumption, as Fischer has failed to do, and who fails to meet all of the requirements for that central city, will be denied. As noted above, there are ample stations in Norfolk and throughout the metropolitan area, and Fischer has failed to provide any explanation for the inconsistency between his present willingness to adopt Norfolk as his community and his prior avowals concerning Newport News. For all of these reasons, it is clear that Fischer has not made a sufficient showing to justify either a waiver of Section 73.188(b)(1) or a finding of substantial compliance with that rule. Since the 307(b) Policy Statement was specifically adopted to assist us in making fair, <u>efficient</u>, and equitable allocations of standard broadcast facilities in metropolitan areas, we are convinced that it would be wholly inappropriate under the circumstances of this proceeding to permit Fischer to operate a new station in Norfolk which would not comply with all of the provisions of Section 73.188(b).

2/ Section 73.188(b)(1) reads as follows:

(b) The site selected should meet the following conditions:

(1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.

Then, for separate reasons, the Commission denied the application of intervenor Tidewater. The Commission concluded that "[d]espite the applicants' failure to demonstrate that their present proposals are realistic, there are indications in this record that realistic proposals would fulfill specific programming needs for communities in this area" (A. 80). The Commission therefore waived Section 1.519 of its Rules, prohibiting repetitious applications, and permitted both applicants to file new applications (A. 81). This appeal followed.

ARGUMENT

I. THE COMMISSION PROPERLY APPLIED ITS 307(b) POLICY STATEMENT TO THE FISCHER APPLICATION.

Fischer's proposal for Newport News would place a 5 mv/m signal over Norfolk, a community nearly three times as large as Newport News and over 50,000 in population (namely, 304,869). These facts made it necessary for Fischer, under the Commission's new 307(b) Policy Statement, to establish at a remand hearing that his proposal was realistically one for Newport News rather than for the larger city of Norfolk.

The Commission's Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 F.C.C. 2d 190, was issued on December 27, 1965. The Commission observed therein that as power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities. Primarily for this reason, the Commission concluded that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and with at least twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified location. At the same time, the Commission noted that this presumption was rebuttable

since there are many communities which adjoin a larger city which well deserve and should be afforded an opportunity to have a local transmission service. The new policy, the Commission stated, was intended "to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a substandard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community." 2 F.C.C. 2d, at 193.

The remand hearing was held and the Commission in its memorandum opinion and order found that (1) Fischer did not offer any evidence to establish, in the face of his coverage of Norfolk, that he would nonetheless realistically serve Newport News, (2) that Fischer's proposal, while he represented he would like to serve Norfolk, did not meet the technical requirements for a city the size of Norfolk, and (3) that Fischer's proposal did not offer any justification for waiver of the Commission's technical rules.

Fischer's primary contention is that the Commission misapplied its 307(b) Policy Statement in reaching its conclusions

here. He challenges the Statement's application to him in three respects: (1) Newport News, Fischer contends, is not the type of community to which the Policy Statement's presumption was intended to apply; (2) his application for waiver was denied for reasons which were not given in the Policy Statement, and (3) the Commission should have considered a letter Fischer sent to the Commission before the remand hearing as being sufficient evidence to rebut the Policy Statement's presumption. We will discuss each point seriatim.

A. The 307(b) Policy Presumption Arises Solely On The Basis Of Objective Criteria. There Are No Implied Or Explicit Exclusions Therefrom.

Fischer claims (Br. 12-15) that the Commission's 307(b) Policy Statement "probably" was not intended to apply to a community such as Newport News. He argues that Newport News is not a suburb but a central city in its own right with a population of over 100,000. He supports this contention by referring to a series of communities in which the Commission considered the central city coverage problem. Each of these instances, he submits, presents demographic proportions quite different from Newport News and Norfolk and supports his contention that Newport News is a central city in its own right. Initially, Fischer's argument is faulty because he failed at any point to present this contention to the Commission (47 U.S.C. 405). In addition, however, there is no merit to his argument that the Policy Statement is not applicable here.

The short answer to Fischer's contention is that the Commission specifically rejected the argument "that the suburban problem could . . . be resolved by the simple determination of whether the proposed suburb was a separate community from its central city . . ." 2 F.C.C. 2d, at 191. The Commission stated that it was convinced that "the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service." 2 F.C.C. 2d, at 192.

The Commission left no room for doubt in stating that "it will be our policy in the future under Section 307(b) to examine <u>every application</u> for new or improved standard broadcast facilities to determine: (1) whether the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur," the Commission unequivocally held, "a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community." 2 F.C.C. 2d, at 192-193.

Newport News has a population of 113,662 while Norfolk's population is nearly three times as large with 304,869. Fischer admits he places a 5 mv/m signal over Norfolk and therefore the

presumption clearly arises. If, indeed, he believed that the Policy Statement was not applicable because of Newport News' own central city nature, Fischer had the opportunity at the time of the remand hearing to offer evidence to this effect. The record indicates, however, that he failed to offer any evidence in rebuttal to the presumption.

B. In Seeking A Waiver Of A Valid Commission Rule, It Was Incumbent Upon Fischer To Justify His Waiver Request; It Was Not Error For The Commission To Discuss Showings Which Could Have Been Made.

When this proceeding was remanded to the examiner for consideration of Fischer's application in light of the Commission's 307(b) Policy Statement, Fischer asked that the Commission consider his proposal as if it were, in fact, one for the larger, central city of Norfolk. Consistent with this position, he offered no evidence to rebut the presumption that his application was for Norfolk. The Commission denied Fischer's request, however, because his proposal, if considered as one for Norfolk, would not comply with §73.188(b)(1) 3/ of the rules since it would provide 25 mv/m service to only 98% of Norfolk's main industrial area and to only 47% of its main business district.

Fischer's sole justification for non-compliance with this technical requirement was summarized by the Commission as follows (A. 72):

3/ Section 73.188(b)(1) provides that the site selected for location of a transmitter should meet the following conditions: "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

> Fischer urges that his proposal would provide approximately 23.4 mv/m service for all of the main industrial area and for 63% of the main business district and that it would provide at least 17 mv/m service for all of Norfolk's main business district. Since virtually all of the industrial area, where the existence of man-made noise makes a high intensity signal most important, would receive the requisite service, Fischer contends that his proposal substantially complies with the requirement of Section 73.188(b)(1).

The Commission found that this did not constitute "a sufficient showing to justify either a waiver of Section 73.188(b)(1) or a finding of substantial compliance with that rule." The Commission explained further (A. 74):

> In paragraph 9 of the 307(b) Policy Statement we pointed out that we "wish to discourage any proposal that will be merely a substandard central city station," and in paragraph 11 we clearly stated that an applicant, who fails to rebut the 307(b) Policy Statement presumption, as Fischer has failed to do, and who fails to meet all of the requirements for that central city, will be denied.

Then in clearly expository language the Commission observed that Fischer in requesting his waiver set forth no valid basis to justify such waiver. He made no showing that there was a need for an additional station in Norfolk, provided no evidence that he would program for Norfolk, and did not even offer an explanation as to why he could not meet the Commission's technical requirements.

Fischer argues (Br. 15-22) that this expository language established standards for waiver which could not be determined by reading the Policy Statement. Essentially this argument misconceives the purpose of the Policy Statement and places the

burden for establishing grounds for waiver of valid rules upon the Commission. It was the intent of the Commission in issuing its 307(b) Policy Statement to serve notice that an applicant, whose proposal covers a larger central city with its 5 mv/m signal, has the burden of establishing that his application is realistically designed to serve the proposed community. At the same time, the Commission pointed out that it wanted to discourage technically substandard central city coverage. Fischer's application, as pointed out above, was found to be technically inadequate. It was never the purpose of the Policy Statement to provide any standards whatsoever for waiver of its technical rules. If Fischer believed he had valid grounds for waiver of §73.188(b)(1), the burden was clearly upon him to justify such a waiver. U. S. v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956).

Moreover, this argument is essentially academic since Fischer made no showing whatsoever to the Commission with regard to his waiver request. Indeed, he does not even assert that he made one. Certainly, in light of this the Commission can hardly be faulted for pointing out the problems with granting a waiver in this case.[4/] In any event, since the Commission has in no instance waived §73.188(b)(1) since the adoption of the Policy Statement,

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4/ Fischer's reliance on V.W.B., Inc., 13 F.C.C. 2d 400 (1968), and the Commission's Clarification of Policy on Section 307(b), 13 F.C.C. 2d 391 (1968), is misplaced since neither opinion deals with what an applicant who seeks a waiver of the Commission's technical rules must show. It was the Commission's determination in V.W.B., Inc. and its Clarification of Policy on Section 307(b) that once a single applicant has met the tehnical requirements and amended his application for the central city, that application should be removed from hearing status and returned to the processing line. Fischer's application never presented this problem as his application never met the technical requirements for Norfolk.

Fischer might well have assumed that he would have to offer some justification for not complying with the Commission's technical rules. Certainly, the showing suggested by the Commission in its decision was not unreasonable under the circumstances.

C. Fischer Failed To Establish That He Would Realistically Serve Newport News. His January 3, 1966 Letter Was Properly Dealt With By The Commission.

Fischer argues (Br. 23-27) that if the Commission could not grant his proposal as one for Norfolk, it should have granted his original application for Newport News. Since Fischer is fully aware that he offered no evidence upon remand to establish that he intended to pursue his application for Newport News, he relies on a letter he sent to the Commission on January 3, 1966 as having provided such evidence. The Commission fully considered this letter and its stated purpose ("to show that an immediate grant of both applications would be consonant with the objectives of the Commission's new 307(b) policies . . .")[5/] when it determined that a remand for 307(b) policy considerations was necessary on January 20, 1966. The Commission noted in its remand order (A. 33 n. 3):

5/ Appellant suggests (Br. 23) that the letter was also designed to show that the 307(b) presumption was not applicable to this case. We have found no language in the January 3, 1966 letter or anywhere else in the record that would seem to confirm this suggestion.

> that Fischer in a letter of January 3, 1966, has alleged, on the basis of information set forth therein, that grant of his proposal is consonant with our Policy Statement, supra, and remand is unnecessary. However, Fischer's contentions are premised upon his view that the Tidewater application must be denied because of the multiple ownership question, and that since he is a "fully qualified applicant all Section 307(b) considerations would normally be rendered moot; and the Fischer application for Newport News would be automatically granted." Since we hold that Tidewater is not disqualified under the multiple ownership issue, and that waiver of the provisions of Section 73.35(a) is warranted, we are of the view that remand and further hearing is required as to both the Tidewater and Fischer proposals.

After the Commission's remand, Fischer neither urged that the Commission consider the letter as evidence to rebut the presumption nor did he give any indication that he was still interested in serving Newport News. Instead, he stated that he was satisfied to be treated as an applicant for a Norfolk station.

Despite this, he now argues that the Commission should have considered the letter on its merits with regard to his original Newport News application because the Commission used the letter in its decision to determine that Newport News had radio needs different from those of Norfolk. In point of fact, the Commission made no such determination with regard to the Norfolk - Newport News programming needs; it merely noted that the appellant had urged this in his January letter. There is no indication that this observation in any way prejudiced Fischer's proposal since his application was denied specifically because of his failure to meet the Commission's technical standards and his failure to offer any justification for waiver.

II. THE COMMISSION COULD PROPERLY ADOPT ITS 307(b) POLICY STATEMENT WITHOUT FIRST CONDUCTING A RULEMAKING PROCEEDING UNDER SECTION 553 OF THE ADMINISTRATIVE PROCEDURE ACT.

In what appears to be a complete turnabout of intent, Fischer attacks for the first time before this Court the Commission's 307(b) Policy Statement, alleging that it amounts to substantive rulemaking promulgated without compliance with the notice provisions of the Administrative Procedure Act, 5 U.S.C. 553 (Br. pp. 8-11). For a number of reasons this argument is without merit.

It is well settled that matters which the agency has not been asked to pass upon will not be considered by a reviewing court.[6/] United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946). And the Communications Act expressly so provides with respect to review of Commission actions, 47 U.S.C. 155(d)(7), 405; see also Florida Gulfcoast Broadcasters, Inc. v. F.C.C., 122 U.S. App. D.C. 250, 352 F.2d 726 (1965). Failure to

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6/ While the specific argument which Fischer raises was considered by the Commission in disposing of the petitions for reconsideration of the 307(b) Policy Statement, simple fairness to administrative agencies dictates that courts consider only errors specifically objected to by an appellant no matter how often the point has been raised by others before the agency. United States v. Tucker Truck Lines, 344 U.S. 33, 37 (1952); Presque Isle v. United States and F.C.C., 387 F.2d 502 (1st Cir., 1967). It should be noted that the 307(b) Policy was issued only after a full oral argument before the Commission. Following the issuance of the Policy Statement several applicants for new standard broadcast stations did seek reconsideration. Fischer made no attempt to participate.

make this argument to the Commission would appear particularly fatal in this instance in that Fischer's actions before the Commission in effect conceded the Policy Statement's validity. Indeed, within a month after the Commission issued its Statement, Fischer wrote the Commission a letter in which he stated that his application was entirely "consonant with the objectives of the Commission's new 307(b) policies . . ." (A. 22). Certainly, if he felt that the Commission had improperly established new substantive standards, Fischer had ample opportunity to make his views known. Instead, when the remand hearing began, he failed to offer any evidence to establish that the 5 mv/m signal which his proposal would place over Norfolk did not in effect make him a Norfolk station. Moreover, he stated that he would like to be considered an applicant for Norfolk.

In any event, the Commission was quite clear that its 307(b) presumption was created as a method of determining whether an applicant should be regarded as proposing a new service for its nominal community or for the nearby central city. In order to make this determination the Commission established the realistic presumption that "where an applicant's proposed 5 mv/m daytime contour penetrates the geographic boundaries of any community with a population of over 50,000 and twice the population of the applicant's specified community," it appears more likely that the applicant proposes to serve the larger community than his specified community. If the presumption cannot be rebutted by material in the application, an evidentiary hearing is held to

determine whether the application should be treated as a proposal for the specified community or for the larger community. The applicant is then in the course of the hearing allowed to rebut the presumption on the basis of evidence of his proposed programming and expected source of revenues.

As pointed out above, Fischer's argument that the Policy Statement amounted to improper rulemaking was raised by other parties who sought to have the Commission reconsider the Policy Statement. At that time the Commission pointed out that

> the policy statement does not make a conclusive determination as to which community a suburban applicant realistically proposes to serve, but merely raises a presumption which may be rebutted during the course of an evidentiary hearing. For this reason, the policy statement simply announced new guidelines to govern future hearings involving suburban applications without establishing any substantive provisions for the grant or denial of any of the applications. Since general statements of policy, such as this, are specifically excluded from the notice and effective date requirements of Section 4 of the Administrative Procedure Act [5 U.S.C. §553], we are convinced that there is no impropriety or infirmity in our adoption of this new approach for suburban applications and that there is no necessity to institute rulemaking proceedings. 2 F.C.C. 2d 867.

The Commission's action here is not unlike Meredith Broadcasting Co. v. F.C.C., 124 U.S. App. D.C. 379, 365 F.2d 912 (1966), where as part of an interim policy the Commission designated for hearing applications in the top 50 television markets if the applicant already had interests in one or more VHF stations in such markets. There, the Court in answer to the same argument raised here stated:

> It is quite obvious that the interim policy, by its very terms, does not prohibit any person from acquiring any particular television station. It establishes no substitute standards. It simply requires that certain applications be subject to hearing; and it does not follow that, because the hearing is had, the application will be denied. 7/

The Commission's 307(b) Policy Statement does no more in this instance. On its face, Fischer's application did not rebut the policy presumption. Thus, it was designated for hearing to provide Fischer with an opportunity to demonstrate that his application was realistically one for Newport News. While Fischer argues (Br. p. 11) that without the Policy Statement his application might have been granted, this contention is mere speculation, particularly in light of the fact that in none of the three decisions prepared by the examiner was Fischer the winning applicant.

Furthermore, it has long been held that "the scope of the inquiry" is among "subordinate questions of procedure," clearly within the Commission's discretion, F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). In discussing administrative "modes" of resolving questions, the Court has recognized the Commission's power "to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest * * *," Pottsville, supra at p. 143. Thus, by providing that an application

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7/ In relying on Kessler v. F.C.C., 117 U.S. App. D.C. 130, 326 F.2d 673 (1963), Fischer assumes the validity of his argument that the Commission has, indeed, issued substantive rules. Albeit, as he points out (Br. p. 9), "substantive rules are those which change standards of station assignments," this in no way supports his contention that the Policy Statement set such new standards.

will be designated for hearing to establish what community it will realistically serve, the Commission was exercising its procedural power to determine "the scope of the inquiry" and "to control the range of investigation." Accordingly, even if the Commission's 307(b) Policy Statement is to be regarded as a rule, as appellant insists, it is plainly a procedural rule rather than one of substance. Since the notice and participation provisions of Section 553 of the Administrative Procedure Act do not apply to such rules, appellant's contention that the Commission's action was in violation of Section 553 is without merit. Moreover, Section 553 insures no more than an opportunity to be heard on matters of substance. Fischer was given this opportunity in a full hearing and declined to offer any evidence.

III. FISCHER'S APPLICATION WAS NOT ADVERSELY AFFECTED BY THE COMMISSION'S GRANT OF A WAIVER OF SECTION 73.35(a) TO TIDEWATER.

Fischer argues at considerable length (Br. pp. 28-37) that the Commission improperly waived Section 73.35(a) of its multiple ownership rules with regard to the application of the intervenor Tidewater. The relevancy of this argument is exceedingly difficult to understand. Since the Tidewater application was ultimately denied for essentially the same reasons as Fischer's, whether the Commission erred in waiving 73.35(a) is at this point a matter of no consequence at all. Thus, even assuming the Commission erred, it is well settled that errors which

have no bearing on the ultimate rights of the parties will be disregarded by the courts. 5 U.S.C. 706; Brown Telecasters, Inc. v. F.C.C., 110 U.S. App. D.C. 127, 289 F.2d 868 (1961).

Furthermore, whatever the merits of Fischer's contention with regard to the Tidewater waiver, it in no way affected the disposition of his own application. Fischer was denied because his proposal was found to be essentially an application for Norfolk which did not meet applicable engineering rules for a station in that community. If, as we have shown, that denial was proper, then disposition of the Tidewater application is of no concern to Fischer, and he would not be adversely affected even if the Tidewater proposal were granted. Simmons v. F.C.C., 79 U.S. App. D.C. 264, 265, 145 F.2d 578 (1944).

In any event, Fischer has not demonstrated that the Commission's action was unreasonable. It is a well established principle that the Commission is allowed wide flexibility in the administration of its rules to carry out the purposes of the Act. Interstate Broadcasting Company v. F.C.C., 105 U.S. App. D.C. 224, 227-229, 231, 265 F.2d 598, 601-603, 605 (1959).

The Commission's multiple ownership rule focuses upon the local and regional problems associated with multiple ownership. As the Commission pointed out in the rulemaking proceeding (1964 Multiple Ownership Rules, 2 Pike & Fischer, R.R. 2d 1590, 1591-92 (1964)):

> The concept embodied in the rules is not complex: When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have "an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level." (Footnote omitted.)

Fischer has in no manner demonstrated that waiver with regard to Tidewater was not warranted. The Commission premised its waiver on the fact that the overlap "will occur mainly over a large body of water and adjacent, uninhabited marsh land" and that Smithfield and Tasley "are clearly separate and distinct communities separated by large bodies of water" (A. 32). Certainly, neither reason would appear to undermine the Commission's goals in prohibiting such multiple ownership.

Fischer's argument that the Commission should have considered the 0.5 mv/m signal overlap is simply not relevant to the waiver question. This matter was considered in the rulemaking proceeding that led to the adoption of the rule, where the Commission stated:

> In AM, unlike FM, the 0.5 mv/m contour has long been regarded as encompassing a station's "normally protected service area." Nevertheless, over the years many stations have been assigned which cause or receive a certain degree of interference within their 0.5 mv/m contours. For this reason, we did not propose to bar overlap of any portion of the normally protected service areas of two commonly owned stations but, instead, proposed to prohibit 1 mv/m overlap. 2 Pike & Fischer, R.R. 2d at 1598-99.

Thus the prohibited overlap of signal strength contours which is relevant under the rules is that of the 1 mv/m contours, and here, since the overlap area, composed of water and swampland, is largely uninhabited, a waiver was granted. Plainly this determination involves no abuse of discretion.

IV. AFTER FISCHER HAD FAILED AT THE HEARING TO ESTABLISH THAT HIS PROPOSAL WAS REALISTIC, THE COMMISSION EXERCISED REASONABLE JUDGMENT IN INVITING NEW APPLICANTS.

While the Commission denied both of the applications in this proceeding, it found ultimately that "[d]espite the applicants' failure to demonstrate that their present proposals are realistic, there are indications in this record that realistic proposals would fulfill specific programming needs for communities in this area" (A. 80).

In light of this, the Commission provided (A. 80-81):

> that Section 1.519 of the Rules, prohibiting repetitious applications, should be waived to permit both applicants to file new applications, which will demonstrate that they are realistically designed to serve the needs of their specified communities. Those new applications may specify the same or a different community, so long as they comply with all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that community. The applicants may specify different transmitter sites and they may reduce their power. However, in no instance will either applicant be permitted to file a new application which would cause or receive interference in areas significantly differing from those areas in which interference would result from a grant of one of the applications which are being denied in this proceeding.*/ At the same time, we shall permit any other interested parties to file applications, conforming to the requirements set forth in this paragraph, so that the most suitable proposal for this area may be selected.
>
> ---
>
> */ In view of the history of this proceeding, the need which exists for realistic proposals, and the apparent difficulty which either applicant would have meeting our present allocation rules, we shall also waive any provision of our present rules, including Section 73.35(a), which would preclude the filing of applications in conformity with this paragraph.

Fischer complains (Br. pp. 38-40) that the Commission's action allowing other parties to file applications violates "basic fairness" and "administrative due process." Fairness dictates, he contends, that the Commission permit him to amend and continue to pursue his application without allowing other interested parties

to file applications.[8/]

There is also no question but that Fischer was provided with a fair opportunity to establish that his proposal was realistically one for either Norfolk or Newport News. The burden to establish either proposal rested entirely with him and was one which he failed to meet. When the Commission remanded the proceeding to the examiner in light of its new 307(b) Policy, Fischer was fully aware that he could either rebut the presumption and demonstrate that his application was realistically for Newport News or, if he was technically qualified for Norfolk, he could have amended his application for that city. In fact, he stated at the outset of the remand hearing that he intended to amend for Norfolk. However, for reasons which the record does not reflect, he did not so amend and he did not offer any evidence to show that his proposal would realistically serve Newport News.

8/ Fischer asserts (Br. 40) that the "spirit" of Section 1.227(b), 47 CFR 1.227(b), of the Commission's rules has been violated. Section 1.227(b), more commonly referred to as the "cut-off" rule, simply provides that applications are to be considered in numerical order according to their file numbers except that those which are mutually exclusive are to be considered together. To facilitate the consideration of all such conflicting applications with reasonable dispatch, the Commission periodically publishes in the Federal Register a Public Notice listing those applications near the top of its processing line. This Public Notice establishes a date (at least 30 days after publication) known as the "cut-off date" by which time any mutually exclusive applications must be filed in order to be eligible for comparative consideration. As can readily be seen, this rule is a prehearing device. The Commission invited new applicants here only after three full hearings had been held and Fischer's application had been denied.

Contrary to his assertion (Br. p. 40), the Commission did not find that Fischer was a fully qualified applicant. Actually, his application was found to be technically inadequate to serve Norfolk, and his failure to offer any evidence to establish that he would realistically serve Newport News leaves no doubt that his application was unqualified for that community as well. It is almost axiomatic if not self-evident that an unsuccessful applicant for a broadcast facility properly denied achieves no rights in any further proceedings to provide service to that community. Moreover it has long been settled that the Commission under the Communications Act has wide latitude over the manner in which it conducts the business of choosing a licensee. 47 U.S.C. 154(i), 154(j). F.C.C. v. Pottsville, 307 U.S. 136, 138 (1940); F.C.C. v. WJR, 337 U.S. 265, 283 (1949); F.C.C. v. Schreiber, 381 U.S. 279, 289-290 (1965). Certainly, the provision in the Commission's opinion allowing Fischer to reapply immediately was exceedingly fair in light of his failure to amend or pursue his application at the remand hearing.

CONCLUSION

Thus, this case indicates that the presumption provided for in the 307(b) Policy Statement is a most reasonable way to determine whether an applicant should be regarded as proposing a new service for its nominal community or for a nearby larger

community. Moreover, in light of this policy the Commission's denial of Fischer's application should be affirmed. Fischer offered no evidence to rebut the presumption and establish that he would realistically serve his nominal community of Newport News, nor was his application technically qualified for the larger community of Norfolk. Because of this failure, termination of the proceeding after three hearings and solicitation by the Commission of new applicants is clearly justified.

Respectfully submitted,

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November 15, 1968

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,942

EDWIN R. FISCHER,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

THE TIDEWATER BROADCASTING COMPANY, INC.,
Intervenor.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

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APPEAL FROM A DECISION OF THE
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BRIEF FOR INTERVENOR

STATEMENT OF THE ISSUES

Intervenor agrees with the Statement of the Issues set forth on pages (iv), (v) and (vi) of Appellant's brief.

Another appeal from the same Decision has been taken by the intervenor and has been assigned Case No. 22,400. Briefs have not yet been submitted.

STATEMENT OF THE CASE

Tidewater will not submit a separate statement of the case. Any restatements of significant background and facts necessary to illustrate particular arguments have been included in the argument.

ARGUMENT

Each of the parties to this appeal is an adversary of the other, Tidewater and Fischer because their applications are mutually exclusive, and both Tidewater and Fischer with the Commission because their applications were denied.

Even though Tidewater has pending its own appeal from the denial of its application (Case No. 22,400), it is vitally concerned with the outcome of Fischer's appeal because judgment for Fischer on some of the questions presented will adversely affect its interests, and judgment for the Commission on other questions may "pull the rug out from under" its own appeal. In this brief, Tidewater will attempt to protect its own interests and will defer arguments in support of its appeal to the brief to be filed in its own case.

Fischer's application should have been denied, not for the reasons set forth in the Commission's final Decision, but under the standard Section 307(b) issue.[1/]

Of paramount importance is the inescapable fact that Fischer's application was denied only because his proposed station at Newport News would provide a listenable signal to the neighboring and larger city of Norfolk, and not because the Commission found no need exists for the proposed station or because the proposed station would not serve the needs and interests of Newport News.

In denying Fischer's application, the Commission might just as well as said: "We do not believe your representations and promises that you will place service of the needs and interest of Newport News ahead of service of the needs and interests of Norfolk; we simply do not trust you not to turn your back on Newport News once your station commences operation."

A more arbitrary and capricious conclusion cannot be imagined.

Fischer's application was denied for failure to satisfy the Policy Statement On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities,

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1/ The standard 307(b) issue was specified in the original hearing Order released October 28, 1959:

> (14) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the instant proposals would best provide a fair, efficient and equitable distribution of radio service.
>
> (R. 478).

2 Federal Communications Commission Reports, Second Series 190, 6 Pike & Fischer Radio Regulation; Second Series 1901, released December 27, 1965 (hereinafter referred to as the 307(b) Suburban Policy.)[2/]

Fischer has been the innocent victim of an unnecessary and vague policy which, as applied here, not only defeats its stated purpose but also defeats the basic purposes, objectives and provisions of the Communications Act of 1934, as amended, 47 U.S.C. §151 et seq.

In the final analysis, the public has been the largest loser by being refused an additional and needed broadcast service.

The genesis of the 307(b) Suburban Policy will be discussed later in this brief.

The argument which follows has been organized to follow Fischer's arguments insofar as practical. Some of the headings are restatements of Fischer's headings to delineate more accurately the argument which follows.

2/ Fischer did not include in his Appendix copies of the 307(b) Suburban Policy statement and related documents. Accordingly, copies of the following documents are submitted as appendices to this brief: Appendix B, the 307(b) Suburban Policy statement, supra; Appendix C, the Commission's Memorandum Opinion and Order released March 10, 1966, denying petitions for reconsideration, 2 FCC 2d 866, 6 Pike & Fischer RR 2d 1908; Appendix D, Clarification Of Policy Station On Section 307(b) Considerations For Standard Broadcast Facilities Involving Suburban Communities, released June 13, 1968, 13 FCC 2d 391, 13 Pike & Fischer RR 2d 1901.

I

THE 307(b) SUBURBAN POLICY IS A SUBSTANTIVE RULE WHICH IS VOID BECAUSE IT WAS ADOPTED WITHOUT COMPLYING WITH THE ADMINISTRATIVE PROCEDURES ACT

Fischer first argues that the 307(b) Suburban Policy is void because it has been given the full force and effect of a substantive rule without having been adopted pursuant to the rule making procedures prescribed by Section 553 of the Administrative Procedure Act, 5 U.S.C. §553.

A review of Fischer's exceptions to the Second Supplemental Initial Decision (App. 36-68), his brief in support of those exceptions (R. 1907-1916), and his oral argument on those exceptions (Tr. 1512-1524; Tr. 1556-1559),[3/] raises a question as to whether this argument was raised before the Commission prior to adoption of the final Decision. Fischer did not seek rehearing under Section 405 of the Communications Act, 47 U.S.C. §405, following issuance of the final Decision. If the Commission argues in its brief that the question is not now before the Court, Fischer most certainly will answer in his reply brief. If the question is not before the Court, it is respectfully requested that the Court assume jurisdiction because of the most substantial importance of the question. The following discussion is presented upon the assumption that the question will be considered by the Court.

Whether the 307(b) Suburban Policy actually is a statement of policy or a substantive rule depends to a very great extent upon the manner in which it has been applied by the

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3/ Unless otherwise noted, record citations (R.) are to Volume 6, Docket No. 13,248, and transcript citations are to Volumes 2 through 5, Docket No. 13,243. Citations

Commission. It calls to mind the axiom: "If it looks like a duck, waddles like a duck, and quacks like a duck, it probably is a duck."

As Fischer correctly points out in his brief, this is far more than just a question of semantics. The 307(b) Suburban Policy was applied to deny Fischer's application just as though it was a substantive rule. Fischer's application satisfied every other rule for assignment as a Newport News station. The only reason why his application was not granted years before the 307(b) Suburban Policy was adopted, or even considered, was because it was mutually exclusive with Tidewater's application for Smithfield.

The procedure which led to the adoption of the 307(b) Suburban Policy is not clear from Fischer's brief.

Three weeks after the remand of this Court in Miner's Broadcasting Service, Inc. v. Federal Communications Commission, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965), the Commission issued a Memorandum Opinion and Order in the Monroeville case inviting certain parties to submit suggestions by way of briefs and oral arguments, as to " . . . what standards should be applied in order to determine which application would better serve the public interest by providing a fair, efficient and equitable distribution of radio service when one or more of the applicants is to be located in a suburban community and proposes to serve adjacent urbanized areas." Because of its importance, a copy of the Memorandum Opinion and Order is attached as Appendix A to this brief.

As is apparent from that Memorandum Opinion and Order, Fischer, Tidewater and other interested parties were not afforded an opportunity to participate, and no specific or even general proposal was advanced for comment.

The procedure outlined in the Memorandum Opinion and Order was followed, briefs were submitted by the parties to the three listed proceedings, oral argument was held, and the 307(b) Suburban Policy was issued.

The 307(b) Suburban Policy statement repeatedly states that an applicant will be given ample opportunity to "rebut the presumption" that his application proposes to establish a new station in the larger city rather than for the specified smaller community. But nowhere does it state what quantum of proof will be required to rebut the presumption. Buried in paragraph 11 is the following: "The application of the applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied." Some, but not necessarily all, of the technical requirements were listed in that same paragraph. The possibility of requesting a waiver of those and other rules was not even mentioned.

Petitions for reconsideration of the 307(b) Suburban Policy statement presented the contention that the policy actually was a rule which had been adopted without following the rule making procedures of the Administrative Procedure Act. In rejecting that contention, the Commission gave repeated assurances that "the policy statement simply announced new guidelines to govern future hearings involving

suburban applications without establishing any substantive provisions for the grant or denial of any of the applications." A copy of that Opinion and Order, released March 10, 1966, is attached as Appendix C of this brief.

In spite of those assurances, the 307(b) Suburban Policy was applied to deny Fischer's application just as effectively as if it was a substantive rule. The denial was based upon the statement in paragraph 11 which is quoted above, that an "application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger city will be denied."

The simple and inescapable fact is that the 307(b) Suburban Policy was applied to deny Fischer's application just as though it had been labeled a rule rather than a policy. Under the circumstances, Fischer's contention that the 307(b) Suburban Policy is void is well founded.

II

THE DENIAL OF FISCHER'S APPLICATION UNDER THE 307(b) SUBURBAN POLICY WAS UNLAWFUL

A. The Policy Was Adopted As An Aid In Making The Section 307(b) Choice Between Mutually Exclusive Applications

Fischer's argument, although not concisely stated, is that the 307(b) Suburban Policy was adopted for the purpose of aiding in making the choice required by Section 307(b) between mutually exclusive applications for different communities, at least one being a suburb of a major city, and not for

the purpose of prohibiting the establishment of a new station in a suburb when no Section 307(b) choice is required. His argument is very strongly supported by the background and history of the policy and by the very language of the statement.

First, the Commission requested the parties to the proceeding which led to adoption of the policy to comment upon ten decisions of the Commission, every single one of which involved at least two mutually exclusive applications. The decisions are listed on page 2 of Appendix B of this brief and most are discussed to a limited extent in Fischer's brief (Br. 12-14).

Second, the policy statement itself speaks only of mutually exclusive applications and the problems of choosing between such applications when at least one proposes a station in a suburban community. Even the title refers to "307(b) Considerations For Standard Broadcast Facilities" in the plural, not the singular. There is absolutely nothing in the entire policy statement which indicates that the policy was to be applied to deny applications which were not mutually exclusive with other applications. (See Appendix B of this brief)

Third, and even more convincing, are the repeated references in the Memorandum Opinion and Order of March 10, 1966 (See Appendix C of this brief) to applications, not merely application. In paragraph 5, the Commission stated:

> For this reason, the Policy Statement simply announced new guidelines to govern future hearings involving suburban applications without establishing any substantive provisions for the grant or denial of any of the applications.

In paragraph 6, the Commission said:

> The approach outlined in the Policy Statement will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas by providing concrete evidence as to which communities the applicants realistically propose to serve and by permitting a more realistic evaluation of the comparative need which each of the applicants proposes to serve.
>
> (Emphasis supplied).

"Comparative need" can only be present where a choice between mutually exclusive applications is required.

Fourth, and perhaps working backwards in time, the history of the 307(b) Suburban Policy further supports Fischer's argument that the policy was adopted as an aid in making the Section 307(b) choice between mutually exclusive applications.

The objectives to be followed in the assignment or allocation of broadcast stations[4/] are set forth in Section 307(b) of the Communications Act, 47 U.S.C. §307(b):

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The flood of applications in the years following World War II included some proposing the first stations in suburbs

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4/ The discussion in this brief is limited to standard (AM) broadcast applications and stations.

of major cities which were mutually exclusive with one or more applications for new stations in other communities. When the mutually exclusive application was for the first station in a community distant from a major city, the Commission encountered absolutely no difficulty in considering the relationship between the suburb and the major city and the accessibility of existing stations in the major city in concluding, under Section 307(b), that the "fair, efficient, and equitable distribution of radio service" would best be achieved by granting the application for the smaller and distant city. One of the earliest cases involved mutually exclusive applications for the first stations at Alameda, California, a suburb of Oakland, and at Palo Alto, some 30 miles south of Oakland and San Francisco. Times-Star Publishing Co., 4 Pike & Fischer RR 718, 725 (1949). The relationship of Alameda to Oakland was considered, and the Palo Alto application was granted. However, when the mutually exclusive application was for an additional station in a major city, the Commission did encounter some difficulty. That was the case of Huntington Broadcasting Co., 5 Pike & Fischer RR 721 (1950), rehearing denied, 6 Pike & Fischer RR 569 (1950), affirmed Huntington Broadcasting Co. v. Federal Communications Commission, 89 U.S. App. D.C. 222, 192 F.2d 33 (1951). In Huntington, the suburban applicant argued that the word "communities" in Section 307(b) had to be construed literally, that his community was only the incorporated city of Huntington Park, that the relationship of Huntington Park to contiguous Los Angeles was irrelevant, and that his application should be preferred over the mutually exclusive application for Los Angeles because Huntington Park had no station

while Los Angeles had numerous stations. The technical proposals of the two applicants were almost identical. The Commission held that, under the factual situation presented, a choice could not be made under Section 307(b), and then based its choice upon the so-called standard comparative issue which involved local ownership, integration of ownership and management, broadcast experience, etcetra. The Court affirmed the Commission's grant of the Los Angeles application.

No difficulty was encountered for the next twelve years during which numerous applications for new stations in suburbs of major cities were granted, most without requiring a hearing and a few after hearings with mutually exclusive applications. Suddenly, and without warning, the Commission adopted a new and novel approach. In Radio Crawfordsville, Inc., 34 FCC 996, 25 Pike & Fischer RR 533 (1963), reconsideration denied, 35 FCC 438, 25 Pike & Fischer RR 1001 (1963), the Examiner had followed the time tested approach and rationale of Times-Star Publishing Co., supra, in granting an application for the first station in the relatively small city of Morris, Illinois, some 50 miles from Chicago, and denying a mutually exclusive application for the first station at Des Plaines, a suburb of Chicago. Although never proposed by any of the parties, not even the Commission's Broadcast Bureau, and never mentioned during oral argument following the initial decision, the Commission, completely on its own and for reasons never understood, at least by counsel for the Morris applicant,[5/] adopted an entirely new rationale

5/ Counsel for Tidewater has some familiarity with Radio Crawfordsville because he was counsel for the Morris applicant.

under which the Des Plaines application was considered as proposing another station for Chicago. Obviously, the Morris application was preferred under both the Examiner's rationale and the Commission's rationale. Huntington was cited by the Commission in support of this new approach.

Radio Crawfordsville was followed closely by the Speidel[6/] and Monroeville[7/] cases. In Speidel, the Commission held that an application for the first station at Kettering, a suburb of Dayton, Ohio, should be considered as an application for an additional station at Dayton and then granted a mutually exclusive application for the first station at Xenia, some 15 to 18 miles east of Dayton. In Monroeville, the Commission held that an application of an existing station at Ambridge, Pennsylvania, to increase power and to be licensed to both Ambirdge and contiguous Aliquippa should be considered as an application for an additional station at Pittsburgh and then granted a mutually exclusive application for the first station at Monroeville, another suburb much closer to Pittsburgh than either Ambridge or Aliquippa. In its opinion remanding the case to the Commission for further consideration, the Court expressed its concern over the rationale of Radio Crawfordsville and Speidel as well as Monroeville.

6/ Speidel Broadcasting Corp. of Ohio, 35 FCC 74, 25 Pike & Fischer RR 723 (1963), reconsideration denied, 35 FCC 755, 1 Pike & Fischer RR 2d 726 (1963), affirmed per curiam, Speidel Broadcasting Corp. v. Federal Communications Commission (CADC), 2 Pike & Fischer RR 2d 2094 (1964).

7/ Monroeville Broadcasting Co., 35 FCC 657, 1 Pike & Fischer RR 2d 607 (1963), reconsideration denied, 36 FCC 296, 1 RR 2d 993 (1964), remanded sub nom., Miners Broadcasting Service, Inc. v. Federal Communications Commission, 121 U.S. App. D.C. 222, 349 F.2d 199 (1965).

Following the remand, the Commission issued the Memorandum Opinion and Order (Appendix A to this brief) initiating the proceeding which led to the adoption of the 307(b) Suburban Policy.

There is absolutely nothing in the history or in any of the documents to support any conclusion concerning the purpose of the 307(b) Suburban Policy other than that it was adopted as an aid in making the Section 307(b) choice between mutually exclusive applications.

B. Whether A Community Is A Suburb No Longer Is Determined By Geographic, Economic And Social Considerations But Only By The Applicant's Technical Proposals

The title, as well as the text, of the 307(b) Suburban Policy statement refer to "Standard Broadcast Facilities Involving Suburban Communities." "Suburb" is defined in Webster's New World Dictionary as "a district, especially a residential district, on the outskirts of a city; often a separately incorporated city or town."

The Commission concluded that Newport News, the city specified as the location of Fischer's proposed station, is a suburb of Norfolk only for the following reasons: (1) the 5 millivolt per meter contour of Fischer's proposed station would fall over or "penetrate" some portion of Norfolk; (2) the population of Norfolk is in excess of 50,000; and (3) the population of Norfolk (305,872) is more than twice the population of Newport News (113,662). The Commission also concluded that Tidewater's community, Smithfield, is a suburb of Norfolk only for the exact same reasons. The

Commission then denied both applications only because the transmitter sites, which were chosen to provide the best possible service to their respective communities, were so far from Norfolk that the strength of the signals over the main business district of Norfolk was slightly less than the ideal.

Fischer argues that "in no sense of the word is Newport News a suburb of Norfolk." (Br. 14). He points out that Newport News, with a population of more than 110,000, is the central city of the Newport News-Hampton Urbanized and Standard Metropolitan Statistical Areas and that Norfolk, with a population of more than 305,000, is the central city of the Norfolk-Portsmouth Urbanized and Standard Metropolitan Statistical Areas.[8/] He does not support his argument by noting that Norfolk and Newport News are separated by some 5 miles by Hampton Roads or by noting that each city has its own radio stations.[9/]

Whether a community actually is a suburb of a nearby city depends upon geographic, economic and social considerations except to the Commission. Under the Commission's guidelines and standards, two applicants for the same suburban community, but with different technical proposals, could be accorded vastly different treatment. If an applicant would

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8/ These Urbanized and Standard Metropolitan Statistical Areas were established by the 1960 United States Census.

9/ Examination of the Commission's files and records discloses that each of the existing Newport News stations now places a 5 millivolt per meter signal over portions of Norfolk.

not place a 5 millivolt per meter signal over a portion of a city of 50,000 or greater, his specified community would not be considered a suburb of the larger city irrespective of the geographic, economic and social ties between the two. If the other applicant for the same suburb would place a 5 millivolt per meter signal over a portion of a city of 50,000 or greater, his exact same specified community would be considered a suburb of the larger city. How ridiculous!

It is well settled that laws, rules and policies must be construed and applied to reach a reasonable, not an impractical or absurd result. When, as here, the 108th largest city in the entire United States,[10/] which because of its importance to the surrounding communities and areas has been designated by the Bureau of the Census as the central city of its own Urbanized and Standard Metropolitan Statistical Areas,[11/] is considered as a suburb of a larger nearby city merely because of the technical proposal of an applicant for a new broadcast station, it is time to bring to a halt the application of such an arbitrary and capricious policy.

10/ 1960 Census of Population, Volume I, Characteristics of the Population, Part A, Number of Inhabitants, pages 1-66 and 1-67.

11/ The Newport News-Hampton Urbanized Area is the 84th largest in the United States. Ibid., page 1-50.

C. Fischer Chose To Sail On Uncharted Waters And Was Shipwrecked

The 307(b) Suburban Policy statement is a masterpiece of vagueness. It speaks repeatedly of rebutting the presumption that "the applicant realistically proposes to serve that larger community rather than his specified community" (Par. 8; Emphasis supplied), but speaks only in the most general terms of the evidence to be presented. Nowhere does the statement even indicate the course to be followed by an applicant not desiring to attempt to rebut the presumption. Nowhere does the statement provide for amendment of applications should an applicant seek to modify and update his proposal to conform to the policy, either by eliminating the penetration of the larger city by the 5 millivolt per meter contour or by specifying the larger city as the proposed station's location. The issues invoking the 307(b) Suburban Policy clearly indicated that an applicant could elect to either attempt to rebut the presumption or permit his application to be considered as one for the larger city.[12/] (App. 33-34).

[12/] The 307(b) Suburban Policy issues were as follows:

(a) To determine whether each of the proposals will realistically provide a local transmission facility for its specified station location or for another larger community, in light of all of the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(1) The extent to which each specified station location has been ascertained by each applicant to have separate and distinct programming needs;

(2) The extent to which the needs of each specified station location are being met by existing standard broadcast stations;

(Cont'd. on next page)

Fischer decided not to attempt to rebut the presumption that his proposal is for a Norfolk rather than a Newport News station and, therefore, did not present evidence under Issue (a) and the four subissues. Nor did he seek to amend his application so as to eliminate all doubt as to compliance with all rules for assignment as a Norfolk station. His application was denied without any comparative consideration with Tidewater's application for failure to fully satisfy Section 73.188(b)(1) of the Commission's Rules, which has been waived in numerous other instances.

As Fischer points out in his brief, the Commission finally awakened to the void in its 307(b) Suburban Policy statement some time after it had issued its final Decision denying Fischer's application, and issued a clarification statement (See Appendix D of this brief) in which it admitted that there were "serious questions concerning the administration

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12/(Cont'd)

(3) The extent to which each applicant's program proposal will meet the specific, unsatisfied programming needs of its specified station location; and

(4) The extent to which the projected sources of each applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(b) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that one or both of the proposals will not realistically provide a local transmission service for its specified station location, whether each such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service.

of the 307(b) Policy Statement" (Br. 20), and provided for the first time a procedure for amendment of applications subject to the policy.

When procedures and requirements are so vague, by the Commission's own admission, it seems manifestly unfair to not have afforded Fischer an opportunity to conform to the procedures later adopted. It must be remembered that this, along with the Monroeville case, was the first decided by the Commission under the 307(b) Suburban Policy. For all practical purposes, the parties, particularly Fischer, were sailing on uncharted waters. Fischer followed one course, and was "shipwrecked." Tidewater followed another course, with exactly the same result, but was wrecked upon other uncharted rocks.

This Court's opinion of October 18, 1968, in Case No. 21,259, Rodale Press, Inc. v. Federal Trade Commission, lends support to Fischer's argument. The following appears on page 8 of the slip opinion:

> The Administrative Procedure Act, in 5 U.S.C. §554(b)(1964) provides in pertinent part: "Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted." (Emphasis supplied.) Hence it is well settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. NLRB v. Johnson 322 F.2d 216, 219-20 (6th Cir. 1963); NLRB v. Fletcher Co., 298 F.2d 594 (1st Cir. 1962).

III

THE WAIVER OF THE OVERLAP RULE WAS NOT ARBITRARY BUT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Up to this point in Fischer's brief (Br. 28), Tidewater has been sympathetic with his problems and arguments because many are common to both parties. Now, however, Tidewater must assert its disagreement with the argument concerning the waiver of the multiple ownership rule, Section 73.35, 47 C.F.R. §73.35, with respect to the overlap of the service areas of Tidewater's proposed station at Smithfield and commonly controlled Station WESR at Tasley, Virginia.

The only reason Fischer has presented this question and argument to the Court is that he knows that he cannot prevail over Tidwater if the ultimate decision is made under the Section 307(b) issue,[13/] because Newport News already has two broadcast stations while Smithfield has none. Fischer's only hope for ultimate success is to have Tidewater disqualified so that comparative consideration of the applications is not required.

Fischer's argument is merely a repetition of arguments made twice to the Hearing Examiner in proposed findings of fact following the second and third hearings, and twice to the Commission, once in exceptions and brief directed to the Supplemental Initial Decision and again in exceptions and brief directed to the Second Supplemental Initial Decision.

[13/] The Section 307(b) issue is set forth in Footnote 12, above.

Each time his argument had been carefully considered and each time it had been rejected. Fischer is merely "beating a dead horse."

A brief review of the background of the multiple ownership rule, Section 73.35, may be of assistance in following the arguments.

For many years the rule, formerly Section 3.35, was not based upon technical or engineering considerations but upon practical considerations. The Commission, in a series of decisions, had held that the rule was not violated even though there would be an overlap of the service areas of commonly owned stations as long as neither station provided a primary service signal to the community in which the other station was located. Under another rule of the Commission, a signal of at least 2 millivolts per meter is required to provide primary service to a community with a population of 2,500 or more. Other decisions of the Commission have held that a community is a concentration of persons with common interests and is not limited to the geographic boundaries of an incorporated municipality but may include surrounding areas and even other incorporated municipalities. Mercer Broadcasting Company, 22 FCC 1009, 1024, 23 FCC 600, 13 Pike & Fischer RR 891, 909 (1957). On July 16, 1962, the Commission issued a notice of proposed rule making inviting comments upon a proposal to amend Section 73.35 (formerly Section 3.35) to prohibit overlap of the 1 millivolt per meter contours of commonly owned or controlled stations. The proposed amendment was adopted on

June 9, 1964. One month later, on July 9, 1964, the Commission issued a Public Notice (Mimeo 53284) stating that the newly amended rule would not be applied in hearing cases where an initial decision had been issued prior to adoption of the new rule and that such cases would be decided under the old rules and policies. The first Initial Decision in this proceeding proposing the grant of Tidewater's application and the denial of Fischer's application had been issued on July 11, 1961 (R. 476-522).

At the time Tidewater's application was filed, which was on February 2, 1959, the majority of its stockholders also owned Station WESR, which began operation at Tasley, Virginia, in January 1958. Tasley is located on the Eastern Shore of Virginia, which is the peninsula separating Chesapeake Bay from the Atlantic Ocean. Tasley is an unincorporated area lying between and immediately adjacent to three incorporated places, Accomac to the east, Onley to the south, and Onancock to the west. Although the estimated population of Tasley is only 742, the combined population of the four places is 3,316. The 0.5 millivolt per meter contour of Tidewater's proposed station--the minimum signal required to provide primary service to rural areas--falls beyond Tasley and encompasses Tasley, Accomac, Onley and Onancock. Tidewater's proposed 2 millivolt per meter contour falls far short of Tasley and its surrounding towns.

At the time Tidewater's application was filed on February 2, 1959, the proposal fully satisfied the multiple ownership rule. If the community of Station WESR is considered

as having a population of 3,316, which was and is consistent with numerous Commission decisions including Mercer, supra, Tidewater's proposed operation would not provide primary service to WESR's community because the strength of the signal would be less than 2 millivolts per meter. If WESR's community is considered only as Tasley, with a population of 742, Tidewater's proposed operation would not provide primary service because Tasley was within an area which would be subjected to objectionable interference from a proposed operation at Catonsville, Maryland. For these reasons, or at least for the latter reason, a multiple ownership issue was not specified by the Commission in its Order of October 28, 1959 (R. 158-168), designating the Tidewater and Fischer applications for hearing.

Experience in the operation of Station WESR indicated that the public would be better served by an increase in power and the resulting increase in strength of the signal within the areas already served. Accordingly, an application to increase power of WESR from one to five kilowatts was filed with the Commission on March 31, 1961 (File No. BP-15024). Although that proposal fully satisfied the multiple ownership rule, action was delayed because of an interference problem with a similar proposal to increase power by a cochannel station in Havre de Grace, Maryland.

Following issuance of the first Initial Decision in this proceeding on July 11, 1961, the Commission imposed a stay which lasted three years. During that period, the multiple ownership rule was amended as discussed above. Although the 1 millivolt per meter contours of Tidewater's

proposed operation at Smithfield and WESR's proposed 5 kilowatt operation overlapped, there was some doubt as to whether the waiver or exception from the newly amended multiple ownership rule was applicable. It appeared as though the Commission would not grant the Tidewater application without designating for hearing the WESR application or, conversely, would not grant the WESR application without ordering a further hearing on the Tidewater application. It was a case of "which came first, the chicken or the egg." The impasse was resolved by Tidewater requesting a further hearing upon its application under a newly added multiple ownership or overlap issue. The WESR application was granted almost immediately, thereby providing improved service at an early date. Following the second hearing, upon the multiple ownership issue, the Examiner issued a Supplemental Initial Decision on April 19, 1965 (App. 5-22) again proposing to grant Tidewater's application.

Fischer filed exceptions to both the first Initial Decision and the Supplemental Initial Decision (R. 1729-1800; 1867-1876). In his exceptions to the Supplemental Initial Decision, he took issue with the proposed waiver of the multiple ownership rule. Oral argument on the exceptions was held before the Commission en banc on December 9, 1965. (Tr. 1140-1178). Before a final decision was issued, the Commission, on December 27, 1965, issued its 307(b) Suburban Policy statement. On January 20, 1966, the Commission released a Memorandum Opinion and Order granting Tidewater a waiver of the multiple ownership rule but remanding the case to the Examiner for further hearing under

307(b) Suburban Policy issues. (App. 31-35). The Second Supplemental Initial Decision, released January 17, 1967 (App. 36-68), proposed for the third time to grant Tidewater's application.

With this rather lengthy and involved history out of the way, Tidewater turns now to Fischer's argument.

As Fischer notes on page 32 of his brief, the Commission ruled that the multiple ownership issue against Tidewater would be resolved by application of Section 73.35 as amended in 1964, and then concluded that the circumstances surrounding the overlap of the 1 millivolt per meter contours was such that a waiver was warranted. (App. 31-32.)

The thrust of Fischer's argument now is that, once the overlap of the 1 millivolt per meter contours was waived, the Commission erred by failing to return to the former rule and policy and then deny Tidewater's application for failure to satisfy the no longer existent policy. His argument then is that the Commission still does not know if Tidewater's proposed operation would provide primary service to Tasley, the location of WESR, because the long pending cochannel application at Catonsville, Maryland, which would cause interference to Tidewater in the Tasley area, has not been granted and may never be granted.

Assuming <u>arguendo</u> that the long abandoned multiple ownership and overlap policy still must be considered, the answer to Fischer is very simple. Even if the Catonsville application should be denied, Tidewater would not provide primary service to WESR's community, which has a population

in excess of 2,500, because the signal would be less than the 2 millivolt per meter minimum required for service to communities with populations of 2,500 and greater.

The other obvious answer to Fischer's argument is that the Commission's application of its expertise was not arbitrary or capricious. This Court often has held that, in the absence of some clear error, it will not substitute its judgment for that of the Commission even though it might have reached another conclusion.

It is respectfully submitted that there is no merit to Fischer's argument that the Commission misapplied its multiple ownership rule when it granted Tidewater's request for waiver.

IV

THE COMMISSION SHOULD HAVE AFFORDED THE APPLICANTS AN OPPORTUNITY TO AMEND THEIR APPLICATIONS SO AS TO COMPLY WITH THE 307(b) SUBURBAN POLICY

Once again, Tidewater finds itself in complete agreement with Fischer.

The extreme inconsistency and the arbitrariness of the Commission's denial of both applications under the 307(b) Suburban Policy becomes apparent in the last few paragraphs of its final Decision (App. 79-80). Nowhere did the Commission find that Fischer's proposed station would not serve the needs of his specified community. That this is so is crystal clear from the following statement at the beginning of paragraph 18 of the Decision: "Since Tidewater has failed to establish

that its proposal would not become a Norfolk station, it will be required to meet all of the technical provisions of our rules for stations assigned to that city." (App. 80).

The Commission then stated:

> 19. . . . Despite the applicants' failure to demonstrate that their present proposals are realistic, there are indications in this record that realistic proposals would fulfill specific programming needs for communities in this area.
>
> 20. Thus, we are persuaded that Section 1.519 of the Rules, prohibiting repetitious applications, should be waived to permit both applicants to file new applications, which will demonstrate that they are realistically designed to serve the needs of their specified communities. . . .
>
> (App. 80)

It is crystal clear from the Decision that a "realistic" proposal must be one which fully satisfies the 307(b) Suburban Policy by not placing a 5 millivolt per meter signal over any portion of a city with a population of 50,000 or greater and which is more than twice the size of the community specified as the station's location. In the case of Fischer, his new application must not provide a 5 millivolt per meter signal to any part of Norfolk. In the case of Tidewater, its new application must not place a 5 millivolt per meter signal over any part of the following cities in the area with a population of 50,000 or greater: It is clear that a "realistic" proposal need not be one which would provide a higher degree of service, or indeed any different service, to Newport News or Smithfield.

To "add insult upon injury" the Commission not only provided for the filing of completely new applications by

Fischer and Tidewater but even invited applications from entirely new parties.

Fischer and Tidewater each have expended many thousands of dollars and almost ten years of work in good faith efforts to provide a service which the Commission concedes is desirable, only to find themselves back where they were ten years ago. But the loss to the Government will be equally as great. If the Decision is permitted to stand, many hundreds of man-hours costing many thousands of dollars already expended by the Commission will be completely wasted. If another hearing is held on completely new applications of new parties, additional hundreds of man-hours costing many more thousands of dollars will be spent by the Commission. Can the Government afford such a luxury at a time when so many pressing demands of the public must go unanswered because of lack of funds? Such wasteful and expensive procedures have the very practical effect of denying both Fischer and Tidewater the full and fair hearing to which each is entitled.

But in the long run, the public is the final and biggest loser. It has been denied a service which the Commission concedes is needed by hearing after hearing after hearing, by decision after decision after decision, and by a three year stay during the hearing for reasons never made clear. Now, a further delay of at least three years will result while yet another hearing is held. How is the public interest served by such wasteful and unnecessary procedures?

This Court most certainly has the power to remand this case to the Commission with instructions to either reconsider the denial of the applications, or to explain more fully why the desired objectives cannot be achieved by permitting Fischer and Tidewater to amend their applications instead of imposing the additional penalty of requiring another full scale hearing upon entirely new applications.

V

THE PURPOSE FOR WHICH THE COMMISSION WAS CREATED HAS BEEN DEFEATED BY THE MANNER IN WHICH THE 307(b) SUBURBAN POLICY WAS APPLIED

Section 1 of the Communications Act, 47 U.S.C. §151, provides that the Federal Communications Commission was created:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all of the people of the United States a rapid, efficient, nationwide and world-wide wire and radio communication service. . . . (Emphasis supplied.)

Section 303 of the Act, 47 U.S.C. §303, in listing the general powers of the Commission, includes:

> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

Section 307(b) of the Act, 47 U.S.C. §307(b), provides:

> (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is a demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and power among the

> several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

The Commission was established to provide service, not withhold service. When Fischer's application was designated for hearing, the Commission affirmatively found that his application fully satisfied all statutory and Commission prerequisites for a grant, and that a hearing was necessary only because of interference problems with other pending applications, primarily Tidewater's mutually exclusive application. (R. 158-168.)

The Hearing Examiner made extensive findings of fact in the first Initial Decision concerning the character of Fischer's community, Newport News (R. 484-485; Para. 14-18) and the program service proposed by Fischer for Newport News and the "Virginia Peninsula," which does not include Norfolk. (R. 504-508; Para. 50-54.) Those findings were not set aside by the Commission's Decision and remain as findings of the Commission.

It is apparent that overzealousness to apply the 307(b) Suburban Policy led the Commission to completely overlook, or to arbitrarily and capriciously ignore, the extensive findings of fact concerning Newport News and the service Fischer would provide to that city and the "Virginia Peninsula," of which Newport News is the principal city.

It is apparent that the Commission, in denying Fischer's application under the 307(b) Suburban Policy, gave

no force and effect to Section 307(b), particularly the meaning of the term "radio service." Because the key to this case lies in the term "radio service," the following explanation, contained in a 1950 report of the Commission concerning the Origination Point of Programs of Broadcast Stations, Docket No. 8747, 1 Pike & Fischer RR 91:465, 91:466, is most pertinent:

> We have consistently held that the term "radio service" as used in Sec. 307(b) comprehends both transmission and reception service. Transmission service is the opportunity which a radio station provides for the development and expression of local interest, ideas and talents and for the production of radio programs of special interest to a particular community. Reception service on the other hand is merely the presence in any area of a listenable radio signal. It is the location of the studio rather than the transmitter which is of particular significance in connection with transmission service. A station often provides service to areas at a considerable distance from its transmitter but a station cannot serve as a medium of local self expression unless it provides a reasonably accessible studio for the origination of local programs. (Emphasis supplied.)

The same definition appears in so many decisions issued over the years that, except for those discussed below, no citations are necessary.

Even though transmission service is far more important than reception service, and even though extensive findings of fact in the first Initial Decision concerning the transmission service Fischer would provide for Newport News were not set aside, the Commission based its denial of Fischer's application only upon the fact that Norfolk is included in the area to which Fischer would provide reception service. The Commission let "the tail wag the dog."

The Commission was established to provide service, not withhold service. The Communications Act provides procedures under which the Commission may insure a "fair, efficient, and equitable distribution of radio service" without denying Fischer's application under the 307(b) Suburban Policy. One of the reasons Section 307(d), 47 U.S.C. §307(d), limits licenses of broadcast stations to terms of not more than three years is to permit review of the manner in which a licensee has fulfilled his obligations under the license. If the Commission, upon review of Fischer's application for renewal of license, finds that Fischer's station has not served as a transmission service for Newport News but has become primarily a Norfolk station, the remedy is simply. Fischer's renewal application can be set for hearing and others can be invited to file applications which might better satisfy the needs of Newport News for a transmission service.

The denial of Fischer's application and the resulting non-use of the channel defeated the basic purposes for which the Commission was established, namely, to provide service.

CONCLUSIONS

For the foregoing reasons, it is respectfully submitted that the Decision of the Federal Communications Commission denying the application of Edwin R. Fischer should be set aside and remanded to the Commission with instructions which

will be compatible with those to be issued in the companion case of The Tidewater Broadcasting Company, Incorporated v. Federal Communications Commission, Case No. 22,400.

Respectfully submitted,

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November 12, 1968

APPENDIX A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FCC 65-590
69581

In re Applications of	)	
	)	
MONROEVILLE BROADCASTING COMPANY	)	DOCKET NO. 14082
Monroeville, Pennsylvania	)	File No. BP-13840
	)	
MINERS BROADCASTING SERVICE, INC. (WMBA)	)	DOCKET NO. 14088
Ambridge-Aliquippa, Pennsylvania	)	File No. BP-13855
	)	

For Construction Permits

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Cox not participating.

1. Before us for consideration is the opinion of the United States Court of Appeals for the District of Columbia Circuit in Miners Broadcasting Service, Inc. v. Federal Communications Commission (Case No. 18492) decided June 17, 1965, remanding this matter for further proceedings. The Court of Appeals' action resulted from an appeal by Miners from our Decision, 35 F.C.C. 657(1963), in which we granted the application of Monroeville Broadcasting Company for a construction permit for a new standard broadcast station and denied the competing application of Miners. In our Decision, we held that the Monroeville application was entitled to a decisive preference under Section 307(b) of the Communications Act because proposed recipients of its service have a greater need therefor than would the recipients of the service proposed by Miners. The Court of Appeals held that our Decision failed to give an adequate explanation of the reasons for our 307(b) preference of the Monroeville application.

2. Applications for review of Review Board Decisions in the Matawan, New Jersey, standard broadcast proceeding (FCC 65R-23, Docket Nos. 14755-14757) and in the Costa Mesa-Newport Beach, California, standard broadcast proceeding (FCC 65R-185; Docket Nos. 15752-15766), presently pending before us, also involve, in part, our overall 307(b) policy. Since such policy is a matter of fundamental importance, we believe it is appropriate to permit argument so that the parties in each of these proceedings may address themselves to the question of what standards should be applied in order to determine which application would better serve the public interest by providing a fair, efficient, and equitable distribution of radio service when one or more of the applicants is to be located in a suburban community and proposes to serve adjacent urbanized areas.

3. Accordingly, we shall schedule oral arguments in this, as well as in the Matawan and Costa Mesa proceedings, in order that we may have a broad range of views to assist us in specifying and clarifying our 307(b) standards. The parties will be permitted, in their briefs and at

5. We take this opportunity to point out that we have no such "underlying policy" as that to which the Review Board referred in its Decision in the Matawan proceeding, namely, "to limit to suburban communities of 50,000 or less the case-by-case consideration of whether proposals for the suburban communities 'should be regarded as proposing a new service for their nominal community or whether, instead, the proposal should be regarded as an application for the central city.'"

ACCORDINGLY, IT IS ORDERED, That the parties in this proceeding may file briefs on or before August 9, 1965, directed only to the questions raised herein, and reply briefs on or before August 23, 1965; and that oral argument IS SCHEDULED before the Commission, en banc, on October 1, 1965, beginning at 10:00 a.m. The parties herein, who, within five days after the release of this Memorandum Opinion and Order, file written notice of intention to appear and participate, shall each be allowed twenty minutes for oral argument.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Adopted: July 7, 1965

Released: July 9, 1965

FEDERAL COMMUNICATIONS COMMISSION

FCC 65-1153
77438
PUBLIC NOTICE
December 27, 1965

WASHINGTON, D. C. 20554

POLICY STATEMENT ON SECTION 307(b) CONSIDERATIONS FOR STANDARD BROADCAST FACILITIES INVOLVING SUBURBAN COMMUNITIES

By the Commission:

1. On July 9, 1965, we released our Memorandum Opinion and Order (1 F.C.C. 2d 319, 5 R.R. 2d 547) stating that oral arguments would be held in three separate proceedings in order to consider the question of what standards should be applied to determine which application would better serve the public interest by providing a fair, efficient, and equitable distribution of standard broadcast service when one or more of the proposed stations is to be located in a suburban community and would serve adjacent urbanized areas. Those oral arguments were scheduled, in part, as a result of the opinion of the United States Court of Appeals for the District of Columbia Circuit in Miners Broadcasting Service, Inc. v. Federal Communications Commission, 349 F. 2d 199, 5 R.R. 2d 2086 (1965), in which the Court stated that we should establish or clarify the standards used to distinguish between two suburban applicants, both of whom propose to serve some parts of their central city and urbanized area. Additionally, we have been aware that a number of cases involving the same problem are in various stages of our hearing processes.

2. The briefs and arguments of the parties in the oral arguments on October 8, 1965, have been valuable in ascertaining the scope of the suburban question and in clarifying our thinking on that question. We appreciate the assistance of all of the parties who participated in those arguments and who provided many helpful comments. Most of the parties were in agreement that our standards for suburban applications should be specified so that each applicant would be on notice of what general standards would be applied to his application and so that the applicant would have an opportunity during the course of the hearing to show how these general standards should be applied to his application. Upon consideration of all of the relevant material presented at those oral arguments, we are of the view that the public interest would be better served by the promulgation of a new policy, specified herein, which would hereafter provide assistance in the allocation of AM stations in suburban communities.

(over)

6. At the same time, as part of our proposed revision of the AM station assignment standards, supra, we considered another approach to the suburban problem. Noting that we wish to encourage new stations which will provide a genuine local service for growing suburban communities, while discouraging new suburban facilities which are merely sub-standard central city stations, we proposed a rule which would have precluded grants providing a multiple service for a large community while ostensibly providing a first local service for a nearby suburb. As proposed, the rule provided that no new AM station would be authorized for a community under 50,000 persons, if the proposal would place a signal of 2 mv/m or greater over more than 25% of the area within any other community of 50,000 or more persons. After receiving comments from interested parties, we concluded that the proposed solution to the suburban problem would produce undesirable results in too many cases to justify its adoption. FCC 64-609, 2 R.R. 1658 (1964). Pointing out that new stations assigned on low frequencies, in areas of high ground conductivity, would have to be located an unreasonably long distance from urbanized areas in order to avoid the adverse thrust of the rule, we stated that suburban applications would be closely examined on a case-by-case basis to determine whether they should be regarded as proposing a new service for their nominal communities or their central cities.

7. After considerable reflection, however, we have become convinced that the Crawfordsville approach to the suburban problem as summarized in paragraph 5, supra, is not satisfactory either. As applicants for suburban communities have argued, the Crawfordsville rationale requires that their high-powered proposals be considered as ones for the central city even though they do not comply with the principal city service provisions of Section 73.188(b), which would be demanded of applications for that city. At the same time, it may be clear that such a suburban applicant will provide main studios and some local programming for his specified community, even though it may be regarded by us as an application for the central city. Since the suburban applicant will fulfill, in some measure, that community's need for a local transmission service, we are now persuaded that the provision of a proposed transmission service for his specified suburban community cannot be overlooked in the 307(b) comparison of competing applications. Each of these factors reinforces our conclusion that a new approach to the suburban problem must be explored.

New Policy Concerning Suburban Applications

8. We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service. Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves

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The Present Problem Concerning Suburban Applications

3. In our Notice of Proposed Rule Making regarding AM station assignment standards, FCC 63-468, 25 R.R. 1615, we redefined our historic goals for allocation of AM broadcast service. As redefined, our objectives, listed in descending order of priority, are, insofar as each is consistent with those preceding it: (a) to provide unimpaired service within the normally protected contours of new and existing standard broadcast facilities; (b) to provide a primary aural service to areas lacking that service; (c) to provide a first, local aural service to as many independent communities as possible; and (d) to provide multiple, local aural services to as many independent communities as possible. We have previously indicated that, when two or more applications for different communities are mutually exclusive, a choice among them, pursuant to Section 307(b) of the Communications Act, requires comparative consideration of such factors as: (a) the areas and populations to be provided a new transmission and reception service, and (b) the number of existing transmission and reception services available to those areas and populations. See, for example, Kent-Ravenna Broadcasting Co., FCC 61-1350, 22 R.R. 605 (1961).

4. In Kent-Ravenna, we noted that the implementation of the above criteria had become increasingly complicated because of the rising number of applications for suburban communities, which would be entitled to a first transmission service preference in a comparative hearing. Pointing out that competing applicants often sought to show that the suburb was not a community separate from its central city and thus did not have that identity of interest to deserve a first transmission service, we held that such questions would be part of the overall 307(b) issue. This approach permitted the presiding Examiner to determine which facets of the suburban problem should be explored in the hearing, and to compare the applications under the usual 307(b) criteria, if each of the applicants proposed to serve separate communities. However, it soon became apparent that the suburban problem could not be resolved by the simple determination of whether the proposed suburb was a separate community from its central city, since virtually all suburban communities have their own political, civic, and social institutions. Radio Crawfordsville, Inc., 34 F.C.C. 996, 25 R.R. 533 (1963).

5. In Crawfordsville, we held that the threshold question requiring resolution is whether the needs of the suburban community are to be considered apart from those of its nearby central city or the urbanized area as a whole, in light of the class, frequency, power, and coverage proposed by the suburban applicant. Thus, a high-powered suburban proposal with substantial coverage of the central city and surrounding area was held to be an application for the central city in the 307(b) comparison. However, we also indicated that the needs of a suburb would be considered apart from those of the central city, if the applicant proposed low power and only minimal coverage of the central city and surrounding area.

6. At the same time, as part of our proposed revision of the AM station assignment standards, supra, we considered another approach to the suburban problem. Noting that we wish to encourage new stations which will provide a genuine local service for growing suburban communities, while discouraging new suburban facilities which are merely sub-standard central city stations, we proposed a rule which would have precluded grants providing a multiple service for a large community while ostensibly providing a first local service for a nearby suburb. As proposed, the rule provided that no new AM station would be authorized for a community under 50,000 persons, if the proposal would place a signal of 2 mv/m or greater over more than 25% of the area within any other community of 50,000 or more persons. After receiving comments from interested parties, we concluded that the proposed solution to the suburban problem would produce undesirable results in too many cases to justify its adoption. FCC 64-609, 2 R.R. 1658 (1964). Pointing out that new stations assigned on low frequencies, in areas of high ground conductivity, would have to be located an unreasonably long distance from urbanized areas in order to avoid the adverse thrust of the rule, we stated that suburban applications would be closely examined on a case-by-case basis to determine whether they should be regarded as proposing a new service for their nominal communities or their central cities.

7. After considerable reflection, however, we have become convinced that the Crawfordsville approach to the suburban problem as summarized in paragraph 5, supra, is not satisfactory either. As applicants for suburban communities have argued, the Crawfordsville rationale requires that their high-powered proposals be considered as ones for the central city even though they do not comply with the principal city service provisions of Section 73.188(b), which would be demanded of applications for that city. At the same time, it may be clear that such a suburban applicant will provide main studios and some local programming for his specified community, even though it may be regarded by us as an application for the central city. Since the suburban applicant will fulfill, in some measure, that community's need for a local transmission service, we are now persuaded that the provision of a proposed transmission service for his specified suburban community cannot be overlooked in the 307(b) comparison of competing applications. Each of these factors reinforces our conclusion that a new approach to the suburban problem must be explored.

New Policy Concerning Suburban Applications

8. We are convinced that the objective evidence of an applicant's proposed coverage, which reflects the engineering factors of ground conductivity, frequency, and power, is sufficient to raise a question as to whether the proposal will be a realistic local transmission service for its specified community or merely another reception service. Our experience compels us to conclude that as their power and coverage are increased to serve larger numbers of persons, stations in metropolitan areas often tend to seek out national and regional advertisers and to identify themselves

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with the entire metropolitan area rather than with the particular needs of their specified communities. For these reasons, it will be our policy in the future under Section 307(b) to examine every application for new or improved standard broadcast facilities to determine: (1) whether the applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population of over 50,000 persons and having at least twice the population of the applicant's specified community. When such a condition is found to occur, a presumption will arise that the applicant realistically proposes to serve that larger community rather than his specified community. Where the test described above indicates penetration of each of two or more larger communities, the presumption will apply with respect to the largest of those communities. If that presumption cannot be rebutted on the basis of the material included within the application, an evidentiary hearing will be held to determine whether the application should be treated as a proposal for the applicant's specified community or for some larger community.

9. This new policy is intended to provide an accommodation of heretofore apparently conflicting allocation considerations. While we still wish to discourage any proposal that will be merely a sub-standard central city station, we are persuaded that many developing and deserving suburban communities should be afforded an opportunity to obtain a first local transmission service. Moreover, while we wish to encourage each applicant to propose as much power as he will need to comply with our allocation rules, every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community. We are convinced that reliance upon the applicant's proposed coverage is a reasonable basis for initiating inquiry into that applicant's intent, since the propagation of a 5 mv/m daytime signal into a community of at least 50,000 persons and over twice as large as the applicant's specified community generally results in the propagation of a competitive signal over a heavily populated area of substantial size, and since service to such an area has often led to our licensees' serving the transmission and reception needs of that area rather than the transmission needs of their specified communities.

10. During the course of an evidentiary hearing to determine, inter alia, whether an applicant will realistically serve his specified community or another, larger community, that applicant will be required to rebut the presumption that will have arisen because of his proposed coverage. Thus, in addition to the usual 307(b) evidence concerning the independence of a suburb from its central city, an applicant will be expected, under our new policy, to adduce evidence at the hearing showing the extent to which he has ascertained that his specified community has separate and distinct programming needs. The parties will then be permitted to show the extent to which that community's

needs are being met by existing standard broadcast stations, and the applicant will be expected to show the extent to which his program proposal will meet the specific, unsatisfied programming needs of his specified community. At the same time, although it would not necessarily be determinative, such an applicant would be expected to adduce evidence as to whether the projected sources of advertising revenues within his specified community are adequate to support his proposal as compared with the sources from all other areas.

11. If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the technical provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. 1/ An applicant who meets those technical requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. The application of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied.

12. We are persuaded that the public interest requires the application of this policy to all pending applications as well as to those filed in the future, whether opposed or not, since it will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas. In those instances when the presumption would not arise, because the applicant's proposed contours do not extend far enough or because the larger community lacks the required population, interested parties may, of course, petition to designate the application for hearing or to enlarge the issues of an already scheduled hearing, and such petitions will receive favorable consideration, if the petitioner makes a threshold showing that the proposal will realistically serve primarily a community other than his specified community.

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Adopted: December 22, 1965

1/ When an applicant for community A, who falls within our test of presumed servi set forth in paragraph 8, supra, for larger community B and also for still larger community C, fails to establish that he will realistically serve his specified com munity A, but demonstrates that he will realistically serve larger community B, he will be required to meet the technical provisions of our Rules and the other requirements of this paragraph only for larger community B, not also for still larger community C.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-229
80171

In re)
)
POLICY STATEMENT ON SECTION 307(b))
CONSIDERATIONS FOR STANDARD BROADCAST)
FACILITIES INVOLVING SUBURBAN COMMUNITIES)

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley absent.

1. On December 27, 1965, we released a Public Notice (2 F.C.C. 2d 190, 6 R.R. 2d 1901) entitled Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, in which we set forth our views on the standards that should be used to evaluate suburban applicants which propose to serve some parts of their central city and urbanized area. We now have before us petitions for reconsideration of that Policy Statement filed by Tinker Area Broadcasting Co., Southington Broadcasters, and Boardman Broadcasting Company, Inc. In addition, Boardman has filed a motion for stay of the effectiveness of the Policy Statement. Each of the petitioners is an applicant for a construction permit for a new standard broadcast station and claims that its interests will be adversely affected by the application of the Policy Statement to its proposal.

2. Initially, Boardman has not attempted to show that it will suffer irreparable injury or that the public interest will be adversely affected if the Policy Statement is not stayed. Under these circumstances, good cause has not been shown for staying the effectiveness of the Policy Statement. Cf. Alvin B. Corum, Jr., FCC 65-355, 5 R.R. 2d 18 (1965). Accordingly, Boardman's motion for stay of the Policy Statement will be denied.

3. Petitioners assert that our Policy Statement modified and amended the legal standards for the assignment of standard broadcast stations and that our action stating a new policy for suburban applications amounts to substantive rule making. Petitioners then argue that we must comply with the provisions of the Administrative Procedure Act before we can adopt fixed standards for the assignment of broadcast stations and that the Policy Statement violates Section 4 of the Administrative Procedure Act since we did not give notice or permit all interested parties to comment upon the proposal. Petitioners request that we return to a case-by-case approach to 307(b) considerations for suburban applications, since the Policy Statement gives no weight to factors, such as directional operation and high conductivity, which rebut the presumption that an applicant realistically proposes to serve a community other than his specified station location. Finally, petitioners urge that, even if it is valid, the Policy Statement should not be

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applied to pending applications.

4. In the Policy Statement we stated that, where an applicant's proposed 5 mv/m daytime contour would penetrate the geographic boundaries of any community with a population over 50,000 and twice the population of the applicant's specified community, a presumption will arise that the applicant proposes to serve the larger community rather than his specified community. We then asserted that, if the presumption could not be rebutted by material in the application, an evidentiary hearing would be held to determine whether the application should be treated as a proposal for the specified community or for some other larger community. We also stated that an applicant will be permitted during the course of such a hearing to rebut the presumption on the basis of evidence of his projected programming and revenues.

5. Thus, the Policy Statement does not make a conclusive determination as to which community a suburban applicant realistically proposes to serve, but merely raises a presumption which may be rebutted during the course of an evidentiary hearing. For this reason, the Policy Statement simply announced new guidelines to govern future hearings involving suburban applications without establishing any substantive provisions for the grant or denial of any of the applications. Since general statements of policy, such as this, are specifically excluded from the notice and effective date requirements of Section 4 of the Administrative Procedure Act, we are convinced that there is no impropriety or infirmity in our adoption of this new approach for suburban applications and that there is no necessity to institute rule making proceedings.

6. By the same token, we are also persuaded that there is no reason to return to an earlier approach in our 307(b) evaluation of suburban applications or to limit the Policy Statement's effect to new applications. The approach outlined in the Policy Statement will materially assist us in making fair, efficient, and equitable allocations of standard broadcast facilities in metropolitan areas by providing concrete evidence as to which communities the applicants realistically propose to serve and by permitting a more realistic evaluation of the comparative need which each of the applicants proposes to serve.

7. At this time we also wish to make clear that evidence with respect to directional operation, ground conductivity, and other similar factors will be given weight under the Policy Statement's new approach. We explicitly noted, in paragraph 8 of the Policy Statement, that an applicant could rebut a presumption with respect to a larger community by the information submitted with his application. Since the purpose of our new approach is to determine whether an applicant will realistically serve his specified community or another larger community, we are persuaded that the type of evidence required to rebut such a presumption will necessarily differ, depending upon, among other variable factors, the applicant's proposed power, antenna directionalization and coverage. Thus, if, prior to designation for hearing or during the course of a

hearing, an applicant shows that his coverage is extended by factors beyond his control (e.g., soil conductivity, the need to protect existing stations, etc.), such facts will be considered in determining whether the presumption has been rebutted.

ACCORDINGLY, IT IS ORDERED, This 9th day of March, 1966, That the above-described motion for stay filed by Boardman Broadcasting Company, Inc., IS DENIED; and

IT IS FURTHER ORDERED, That the above-described petitions for reconsideration, filed by Tinker Area Broadcasting Co., Southington Broadcasters, and Boardman Broadcasting Company, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: March 10, 1966

FEDERAL COMMUNICATIONS COMMISSION

FCC 68-624
16642
PUBLIC NOTICE - B
June 13, 1968

WASHINGTON, D. C. 20554

CLARIFICATION OF POLICY STATEMENT ON SECTION 307(b) CONSIDERATIONS FOR STANDARD BROADCAST FACILITIES INVOLVING SUBURBAN COMMUNITIES

1. On December 22, 1965, we adopted the Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities, 2 FCC 2d 190, 6 RR 2d 1901, in which we set forth our new standards for standard broadcast stations that would be located in a suburban community and that would serve adjacent urbanized areas. We stated that every applicant who falls within our test will be required to demonstrate that his proposal is designed to provide a realistic local transmission service for his specified community and that an applicant who fails to make the necessary showing will be treated as one proposing the larger community and be required to meet all of the technical provisions of our rules for stations assigned to that larger community. We also stated that such an applicant, who meets all of those technical requirements, will be permitted to prosecute his proposal as if he were an applicant for that larger community and that he might receive a grant on the condition that the application is amended to specify the larger community as his station location.

2. However, it has recently come to our attention that these provisions are capable of being used by a lone applicant to obtain a grant without complying with all of our regulations and policies governing applications for the larger community. Thus, such an applicant, specifying a suburban station location and complying with the technical requirements for the larger community, could seek a grant as a station for the larger community without showing, before his application is accepted for filing, that he meets all of our allocation requirements, without demonstrating that he has investigated and proposed to meet the needs and interests of the larger community in his programming proposal, and without giving notice of his intention to serve the larger community so that any other interested party would have an opportunity to propose service for the same or a needier community. Such a result was not contemplated when we adopted the 307(b) Policy Statement. There is no reason why such an applicant, who is merely seeking a grant of his application by any means possible, should be considered as proposing the larger community when he has made no attempt to comply with our regulations and policies for stations assigned to that larger community.

3. For these reasons we are convinced that the 307(b) Policy Statement should be clarified to preclude such a lone applicant from obtaining a grant of his application for a station in the larger community without complying with all of our requirements for that community. */ As specified in the clarified language of paragraph 11 of the Policy Statement, when such an applicant seeks a grant for the larger community, he must formally petition to amend his application to specify the larger community as his station location. If the amendment is granted, the application will be removed from hearing, returned to the processing line, assigned a new file number, and required to comply with all of our regulations and policies for that larger community before it can be granted. Accordingly, paragraph 11 of the 307(b) Policy Statement is hereby clarified as follows:

> 11. If an applicant sustains his burden under the specified issues and rebuts the presumption, he will be treated as an applicant for his specified community and accorded all of the 307(b) considerations which flow therefrom. However, if the applicant fails to rebut the presumption, he will be treated as an applicant for the larger community and required to meet all of the provisions of our Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2), for stations assigned to that larger community. 1/ An applicant who meets those requirements will be permitted to prosecute his proposal as if he were an applicant for that larger community. However, he will be accorded only the 307(b) preference to which that larger community is entitled and will be granted only upon the condition that he amend his application to specify the larger community as his station location. Where a lone applicant originally proposes to serve a smaller community and subsequently seeks an authorization for the nearby larger community, he will be required to petition to amend his

1/ When an applicant for community A, who falls within our test of presumed service, set forth in paragraph 8, supra, for larger community B and also for still larger community C, fails to establish that he will realistically serve his specified community A, but demonstrates that he will realistically serve larger community B, he will be required to meet the technical provisions of our Rules and the other requirements of this paragraph only for larger community B, not also for still larger community C.

*/ While we are aware that a similar problem could also arise in a multiple applicant proceeding, we are persuaded that it would be more appropriate to determine the procedure to be followed under such circumstances on the basis of the specific facts which may hereafter be presented to us.

application to specify that larger community. If the amendment is granted, the application will be removed from hearing, returned to the processing line, assigned a new file number, and the applicant will be required to comply with all of the provisions of our regulations and policies for that larger community before his application will be granted. The proposal of an applicant who fails to rebut the presumption and fails to meet all of the technical requirements for that larger community will be denied.

Action by the Commission June 12, 1968. Commissioners Hyde (Chairman), Lee, Cox, Loevinger and Johnson.

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